DOCKET

No. 08-6
Title: District Attorney's Office for the Third Judicial District, et al., Petitioners
v.
William G. Osborne
Docketed: July 1, 2008
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-35875)
Decision Date: April 2, 2008
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 5 2008	Additional record received from U.S.C.A. for the 9th Circuit. (1 envelope)
Jun 27 2008	Petition for a writ of certiorari filed. (Response due July 31, 2008)
Jul 10 2008	Waiver of right of respondent William G. Osborne to respond filed.
Jul 23 2008	DISTRIBUTED for Conference of September 29, 2008.
Jul 25 2008	Response Requested. (Due August 25, 2008)
Aug 7 2008	Order extending time to file response to petition to and including September 24, 2008.
Sep 24 2008	Brief of respondent William G. Osborne in opposition filed.
Oct 8 2008	DISTRIBUTED for Conference of October 31, 2008.
Oct 17 2008	Reply of petitioners District Attorney's Office for the Third Judicial District, et al. filed. (Distributed)
Nov 3 2008	Petition GRANTED.
Nov 25 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including December 24, 2008.
Dec 8 2008	SET FOR ARGUMENT ON Monday, March 2, 2009
Dec 19 2008	Record received from the U.S.C.A. for the Ninth Circuit.
Dec 22 2008	Record received from the U.S.D.C. for the District of Alaska. (1 box)
Dec 23 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondent.
Dec 24 2008	Joint appendix filed. Statement of costs received.
Dec 24 2008	Brief of petitioners District Attorney's Office for the Third Judicial District and Adrienne Bachman, District Attorney filed.
Dec 24 2008	Brief amici curiae of K.G. and The National Crime Victim Law Institute filed.
Dec 29 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the petitioners.
Dec 29 2008	Brief amicus curiae of City of New York filed.
Dec 31 2008	Brief amicus curiae of United States filed.
Dec 31 2008	Brief amici curiae of California, et al. filed.
Dec 31 2008	Brief amici curiae of Council of State Governments, et al. filed.
Jan 7 2009	The time within which to file respondent's brief on the merits is extended to and including January 26, 2009.
Jan 9 2009	CIRCULATED.
Jan 9 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Jan 26 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 26 2009	Brief of respondent William G. Osborne filed. (Distributed)
Jan 30 2009	Record request to C.A. 9th Circuit for No. 04-35126.
Feb 2 2009	Brief amici curiae of Jeanette Popp, et al. filed. (Distributed)
Feb 2 2009	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 2 2009	Brief amici curiae of Current and Former Prosecutors filed. (Distributed)
Feb 2 2009	Brief amici curiae of Individuals Exonerated by Post-Conviction DNA Testing filed. (Distributed)
Feb 2 2009	Brief amici curiae of Eleven Individuals Who Have Received Clemency Through DNA Testing filed. (Distributed)
Feb 23 2009	Reply of petitioner District Attorney's Office for the Third Judicial District, et al. filed. (Distributed)
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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

08-6 JUN 27 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 07-___

IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

William Osborne was charged with kidnapping, sexual assault, and physical assault. He had the assistance of a competent lawyer who made a reasonable strategic decision to forgo independent DNA testing of the state's biological evidence. He was convicted after an error-free trial. Now, years later, Osborne has filed an action under 42 U.S.C. § 1983, seeking access to the biological evidence for purposes of new DNA testing. The questions presented are:

1. May Osborne use § 1983 as a discovery device for obtaining postconviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material?

2. Does Osborne have a right under the Fourteenth Amendment's Due Process Clause to obtain postconviction access to the state's biological evidence when the claim he intends to assert – a freestanding claim of innocence – is not legally cognizable?

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DISTRICT ATTORNEY'S OFFICE FOR THE
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the United States Court of Appeals (App. 1a, 51a) are reported at 521 F.3d 1118 and 423 F.3d 1050. The district court's order (App. 46a) is reported at 445 F. Supp.2d 1079. The opinions of the Alaska Court of Appeals in Osborne's postconviction relief case (App. 63a, 91a) are reported at 163 P.3d 973 and 110 P.3d 986. The opinion of the Alaska Court of Appeals in Osborne's direct appeal (App. 113a) is unpublished and available at 1996 WL 3368444.

JURISDICTION

The United States Court of Appeals issued its decision on April 2, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, section 1, of the United States Constitution provides in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

42 United States Code § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

Rule 6(a), Rules Governing Section 2254 Cases in the United States District Courts, provides in part:

> A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.

STATEMENT OF THE CASE

1. *The attack on K.G.* On March 22, 1993, Osborne and his friend Dexter Jackson solicited K.G. to perform fellatio in exchange for $100. App. 112a.

They took her, in Jackson's car, to a secluded site near Anchorage International Airport, raped her at gunpoint inside the car, beat her with an axe handle, shot her, and left her for dead in the snow. App. 113a-115a.

2. *The police investigation.* Five days after the attack, the police stopped Jackson's car, which matched the description K.G. had provided. App. 116a. The police found a .380-caliber semi-automatic pistol in the car and a box of ammunition under the seat. *Id.* In Jackson's pocket was K.G.'s Swiss Army knife, which Jackson and Osborne had taken from her. *Id.* Jackson was arrested, confessed, and implicated Osborne.[1] App. 4a, 98a, 115a.

The police seized Jackson's car. App. 115a. Forensic examination revealed blood spots in the car. *Id.* DQ-alpha (DQA) DNA testing of a blood spot on the door matched K.G.'s profile, which is found in 4.4 to 4.8 percent of Caucasian females. App. 67a, 95a, 116a. Fibers matching the carpeting in the car were found on K.G.'s clothing. App. 116a.

The police also canvassed the crime scene, finding "an area of disturbed and bloody snow." App. 117a. They found two pairs of K.G.'s bloody pants, a used blue condom, and an expended round of .380 ammunition. *Id.* Testing revealed that the round had come from Jackson's pistol. *Id.* The police were able to match tire tracks at the scene with Jackson's car. *Id.* Located 114 feet away from the crime scene, the police found an axe handle similar to those Osborne

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[1] Osborne and Jackson were tried jointly, thus rendering Jackson's implication of Osborne inadmissible against Osborne at trial.

used in his work. *Id.* The police also found a similar axe handle in Osborne's room. *Id.*

Seminal fluid inside the blue condom was submitted for DQA DNA testing. App. 117a. The semen matched Osborne's DQA type, which has a frequency of 14.7 to 16 percent among African-Americans. App. 68a, 96a, 117a. The testing excluded Jackson and James Hunter, Jackson's passenger at the time his car was stopped. App. 5a. Pubic hairs found on the condom and on K.G.'s sweater had the same microscopic characteristics as Osborne's pubic hair. App. 117a.

Osborne was seen getting into Jackson's car shortly before the attack against K.G. App. 76a. And Osborne and Jackson were seen together shortly after the attack. *Id.* When seen after the attack, Osborne had blood on his clothing. *Id.*

Finally, K.G. identified both Osborne and Jackson from photographic lineups. App. 4a, 116a-117a. She also identified Osborne at trial. App. 7a.

3. *Osborne's trial and conviction.* Osborne was convicted, after a jury trial in Alaska Superior Court, of kidnapping, first-degree sexual assault, and first-degree assault. App. 117a. He was given a composite sentence of 26 years with 5 years suspended. App. 117a-118a. The Alaska Court of Appeals affirmed Osborne's convictions and sentence. App. 118a.

4. *Osborne's state application for postconviction relief.* In 1997, Osborne filed a postconviction relief application in Alaska Superior Court, claiming that his lawyer had incompetently failed to submit the blue condom for independent DNA testing using a more discriminating method than the DQA method used by the state. App. 97a. (At the time of Osborne's

trial, testing using the more discriminating restriction-fragment-length-polymorphism (RFLP) method was available. App. 5a, 69a, 97a.) He also asked the court to order retesting of the state's biological evidence using a more discriminating DNA test method. App. 97a. He claimed that the results of that retesting would establish the prejudice necessary for his ineffective assistance and would also prove his innocence. *Id.*

Osborne's lawyer submitted an affidavit defending her decision not to submit the condom for independent RFLP testing, explaining that "the statistics were in Osborne's favor, due to a relatively high frequency in the population of the profile of the case DNA." App. 97a-98a. She reasoned that because the state's test established a 1-in-6 chance that a random person would have the same profile as Osborne, those were "very good numbers" to make a case for mistaken identity, particularly in light of the facts that Osborne was African-American and K.G. was Caucasian, the crimes took place at night, and K.G. had poor vision. App. 98a. This, the lawyer concluded, put Osborne in a "strategically better position" than he would be in if the condom were submitted for RFLP testing, which the lawyer believed would only confirm Osborne as the perpetrator. *Id.*, *see also* App. 70a. The state superior court denied Osborne's application, finding that his lawyer had reasonably rejected independent testing because she disbelieved Osborne's claim of innocence and wanted to avoid confirming his culpability. App. 99a. The Alaska Court of Appeals affirmed the superior court's denial of Osborne's ineffective assistance of counsel claim. App. 100a-102a.

The superior court also denied Osborne's request for retesting of the biological evidence by more dis-

criminating methods. App. 99a. Osborne sought reconsideration, arguing that he had a due process right to additional testing so that he could prove his innocence. *Id.* Denying reconsideration, the court ruled that neither state nor federal due process gave Osborne a right to postconviction testing under the facts of his case. *Id.* The Alaska Court of Appeals discussed this newly raised due process claim at length. App. 102a-112a

The Alaska court held that, "at least under federal law, a defendant who has received a fair trial apparently has no due process right to present new postconviction evidence, even when that evidence would demonstrate the defendant's innocence." App. 106a (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *id.* at 427-28 (Scalia, J., concurring)), 109a ("It appears, therefore, that Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence.").

After rejecting the claim under federal law, the Alaska Court of Appeals considered whether Alaska's constitution would afford Osborne relief. App. 109a-111a. The court remanded Osborne's case for consideration of (1) whether the evidence against Osborne would satisfy the standard developed from out-of-state cases that had recognized a state constitutional right to pursue an innocence claim and (2) whether the Alaska Constitution provided a similar right. App. 111a-112a.

On remand, the superior court concluded that Osborne could not meet the standard that would afford him a right to postconviction testing. App. 72a. In addition to reviewing the evidence presented at Osborne's trial, the court considered the fact that Osborne had applied for parole and had confessed,

both in writing and orally, to his role in the attack on K.G. App. 71a & n.11. The court listed the evidence, in addition to the blue condom, linking Osborne to the crime scene: (1) Osborne had twice prior to the crime telephoned Jackson from the arcade where Jackson had picked him up; (2) Osborne was seen getting into Jackson's car shortly before the crime occurred; (3) tickets from the arcade were found in Jackson's car; (4) witnesses saw Osborne and Jackson together shortly after the crime occurred, and some of these witnesses observed blood on Osborne's clothing; and (5) K.G. told the driver who picked her up immediately after the attack that her attackers were "two black guys with military . . . haircuts," a description consistent with Osborne's physical characteristics. App. 76a. Thus, even if new testing were to exclude Osborne as the donor of the DNA in the condom, the superior court found that (1) the condom "might have been coincidentally left in the vicinity by other people before the police arrived," (2) "'extensive other evidence'" linked Osborne to the attack, and (3) Osborne had confessed. App. 72a-73a (quoting superior court), 78a-79a.

The case then returned to the Alaska Court of Appeals, which agreed with the superior court's conclusion that new testing that excluded Osborne "would not conclusively establish [his] innocence." App. 79a. A majority of the court of appeals concluded that the Alaska Constitution might require a court to hear a postconviction innocence claim by a defendant who presented "clear genetic evidence" of innocence. App. 89a (Mannheimer, J., with Coats, C.J., concurring). But, based on the superior court's analysis of the evidence against Osborne, Osborne could not meet that threshold, even if new test results were favorable to him. App. 89a-90a.

The Alaska Supreme Court denied Osborne's request for discretionary review. App. 10a (citing *Osborne v. State*, No. S-12799 (Alaska, January 22, 2008)).

5. *Osborne's federal civil rights action.* After Osborne's state postconviction relief application was initially denied by the superior court, and almost ten years after his conviction, he filed a civil rights action under 42 U.S.C. § 1983 in federal district court. App. 10a, 51a. He sought to compel the state to provide him access to the biological evidence used to convict him, alleging that withholding access violated his constitutional rights.[2] App. 51a, 54a. Osborne wanted to submit the evidence for DNA testing, using the short-tandem-repeat and mitochondrial methods. App. 11a, 54a. And if the results were favorable to him, then he would use them to support a free-standing claim of innocence that he intended to file in state or federal court. App. 58a. The district court dismissed Osborne's complaint, concluding that his claim had to be asserted in a petition for writ of habeas corpus. App. 54a.

The Ninth Circuit reversed, concluding that Osborne was entitled to pursue his claim under § 1983 because his success on that claim would not necessarily demonstrate the invalidity of his confinement. App. 58a-59a. According to the court, Osborne's success would only afford him access to the evidence he sought and would have no effect on the validity of his

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[2] Osborne sued the Anchorage District Attorney's Office for the Third Judicial District, the Anchorage District Attorney, the Anchorage Police Department, and the police chief. The police department and its chief have since been dismissed from the case. App. 12a.

confinement. *Id.* The Ninth Circuit remanded the case to the district court for consideration of whether Osborne had a federally protected right of access to the biological evidence. App. 62a.

On remand, the district court granted Osborne's motion for summary judgment (and denied the state's cross-motion). App. 50a. The state appealed, and the Ninth Circuit affirmed the district court's order. App. 1a-2a.

The Ninth Circuit concluded that Osborne had a due process right under the Fourteenth Amendment that barred the state from denying him postconviction access to biological evidence that might be material to the freestanding innocence claim he hoped to make. App. 44a. The court based this conclusion on *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. App. 15a-19a. The court assumed that a freestanding innocence claim was legally cognizable in federal court and reasoned that Osborne should have access to the evidence even though he had not yet actually asserted his innocence claim. App. 20a-23a.

REASONS FOR GRANTING THE PETITION

Over the past 25 years, DNA technology has become a crucial component in the investigation and prosecution of criminal offenses. Advances in this technology have changed how criminal cases are prosecuted. Moreover, the same technology has played a pivotal role in the exoneration of convicted defendants. In the present case, the Ninth Circuit has attempted to create a mechanism by which a criminal defendant can take advantage of these technological advances years after the defendant was convicted following an error-free trial.

The Ninth Circuit erred not in its recognition of the technological advances but in its willingness to step far beyond existing constitutional norms to address the issue. In essence, the court created from whole cloth a Constitution-based, litigation-style discovery right. And the court chose to allow this right to be asserted outside the boundaries of any ongoing post-conviction litigation. As formulated by the Ninth Circuit, this new right, constitutional in dimension, is essentially freestanding and has few, if any, limits. In fact, the court said that "testing of potentially exculpatory evidence may be given precedence over the consideration of even jurisdictional questions involving pure issues of law." App. 21a. The Ninth Circuit's decision gives rise to two important issues that merit this Court's review:

1. The court allowed a convicted defendant to bring a claim under 42 U.S.C. § 1983 for the purpose of conducting discovery in connection with a yet-to-be-asserted actual innocence claim. App. 58a-59a. In allowing Osborne to do this, the Ninth Circuit unhitched the right of access from its mooring to ongoing litigation, instead creating an independent right. App. 20a-22a. Three circuits – the Fourth, Fifth, and Sixth – have rejected this use of § 1983, concluding that the access-to-evidence claim is ultimately part and parcel of a challenge to the validity of a defendant's conviction.

2. The court created a postconviction right of access to evidence under the Due Process Clause by extending the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. App. 15a-16a, 23a. Three circuits – the Fourth, Sixth, and Eleventh – have refused to apply the *Brady* doctrine in a post-conviction context. The basis for the Ninth Circuit's

extension of *Brady* is that the evidence Osborne seeks is potentially material to his yet-to-be-asserted actual innocence claim. But the court assumed away the fact that a freestanding innocence claim is not cognizable. App. 20a-22a. This assumption conflicts with decisions by nine other circuits, all of which have concluded that a freestanding innocence claim is not cognizable in federal court.

I. CERTIORARI IS WARRANTED TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT A DEFENDANT'S POSTCONVICTION ACCESS-TO-EVIDENCE CLAIM IS COGNIZABLE IN § 1983 ACTIONS

A prisoner in state custody may not use a § 1983 action to challenge the fact or duration of imprisonment, but rather must seek habeas corpus relief. *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005). The cognizability of a claim under § 1983 depends on the effect of a favorable judgment on the prisoner's claim. An action under § 1983 is barred if success on a claim "would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81-82. The claim must then be asserted in a habeas petition. *Id.*

The Ninth Circuit concluded that Osborne could bring his access-to-evidence claim in a § 1983 action because a judgment in his favor would have no effect on his confinement. App. 58a-59a. That is, if Osborne were to succeed, he would merely obtain access to the evidence he seeks for the purpose of conducting new DNA testing. App. 59a. The results of that testing would not necessarily invalidate his confinement. *Id.* Rather than exculpating Osborne, the results might inculpate him or be inconclusive, which would either confirm or have no effect on the

validity of his confinement. *Id.* And to challenge his conviction, Osborne would have to file a separate action. *Id.*

A. The courts of appeal are divided on this issue

The Ninth Circuit's conclusion conflicts with decisions of the Fourth, Fifth, and Sixth Circuits. On the other hand, the Seventh and Eleventh Circuits, like the Ninth Circuit, have allowed access-to-evidence claims to be brought under § 1983. *See Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006); *Bradley v. Pryor*, 305 F.3d 1287, 1290-91 (11th Cir. 2002).

The Fourth Circuit rejected a claim substantially identical to Osborne's in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002). The court correctly concluded that the claim was not cognizable under § 1983 because the access-to-evidence claim was the "first step" in challenging the validity of the defendant's conviction. *Id.* at 375. In other words, the defendant "[wa]s trying to use a § 1983 action as a discovery device to overturn his state conviction, . . . set[ting] the stage for a future attack on his confinement." *Id.* at 378. The Ninth Circuit rejected *Harvey*'s conclusion as having "strayed" from the principle that § 1983 can be used for claims that would not necessarily imply the invalidity of confinement or its duration. App. 61a.

The Fifth Circuit, relying on *Harvey*, reached the same conclusion in *Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002) (per curiam). The defendant in *Kutzner*, like Osborne, sought access to biological evidence for the purpose of conducting new DNA testing. The court recognized that the defendant's access claim was "so intertwined" with an

attack on his confinement that its "success would necessarily imply revocation or modification of confinement." *Id.* at 341 (internal quotations omitted).

The Sixth Circuit reached substantially the same conclusion in *Boyle v. Mayer*, 46 Fed. Appx. 340 (6th Cir. 2002) (unpublished). The defendant there sought access to biological evidence for new DNA testing so that he could prove his innocence. The court equated this with a challenge to the validity of his conviction. *Id.*

B. Issues relating to the discovery of evidence relevant to an actual-innocence claim should be resolved by a habeas court

This case involves the timing and scope of discovery. The Ninth Circuit created what can only be described as a right to discovery that exists independently of any substantive claim to which the evidence sought might be material. But the conduct and scope of discovery are issues that must be resolved in the context of the underlying substantive claim to which the evidence sought might be material. There is a good reason for this.

Materiality is not an intrinsic quality of evidence, but rather exists only in the context of some discrete substantive claim: "the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1989); *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987) ("The 'materiality' of a fact is determined by the substantive law governing the claim or defense."). Evidence is material when it relates to "a fact that is of consequence to the determination of the action." 1 Weinstein, *Weinstein's Evidence* ¶ 401[03] n.1 (1982) (internal

quotation omitted), *quoted in United States v. Bagley*, 473 U.S. 667, 703 n.5 (1985) (Marshall, J., dissenting). *See also* Cleary, et al., *McCormick on Evidence* § 185 at 541 (3d ed. 1984) (evidence is immaterial when offered in support of "proposition which is not a matter in issue"), *quoted in Bagley*, 473 U.S. at 703 n.5 (Marshall, J., dissenting).

Materiality is therefore rooted in the substantive law that establishes a substantive right, claim, or defense at issue in pending litigation. It is on this point that the Ninth Circuit's decision founders. The right of access created by the Ninth Circuit lacks a point of reference to an underlying substantive claim. Instead, the court concluded:

> [U]ntil Osborne has actually brought an actual innocence claim and has been given the opportunity to develop the facts supporting it, Osborne's access-to-evidence claim may proceed on the well-established assumption that his intended freestanding innocence claim will be cognizable in federal court.

App. 22a. With this conclusion, the Ninth Circuit severed the right of access to evidence from any pending action or procedure, creating a standalone postconviction discovery right unrelated to any substantive claim.

The Ninth Circuit thus chose to measure materiality in the abstract. The tool adopted by the court for this purpose was doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), which obligates the government to disclose to a defendant favorable evidence that "is material to guilt or punishment." App. 15a-16a (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)). But applied in a postconviction context, the *Brady* doctrine is ill-suited for this purpose.

As discussed more fully in part II, *infra*, the *Brady* doctrine secures a defendant's right to a fair trial. When a defendant alleges a *Brady* violation in the context of a trial, relief is appropriate only if the undisclosed evidence is "material." The "touchstone of [this] materiality is a 'reasonable probability' of a different result" – that is, an acquittal. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Materiality in this context considers the undisclosed evidence against the background of the trial evidence and requires a backward-looking assessment of the potential effect the evidence would have had on the outcome of the trial. In contrast, materiality in the postconviction context of Osborne's case requires a forward-looking assessment that considers the connection between the evidence and the substantive claim to which it relates. And it is this element – an actual substantive claim – that is missing in Osborne's case.

Osborne has no ongoing substantive claim that would trigger the discovery concerns he has raised. And while Osborne has declared his intention to file a freestanding innocence claim, nothing binds him to that declaration. Within this void, the Ninth Circuit has failed to identify any valid basis for allowing Osborne to conduct discovery that is untethered to any pending substantive claim.

If Osborne wants to assert a freestanding claim of innocence, he must file a habeas petition (or whatever other form of postconviction relief that might be available to him). And if the legal cognizability of that claim is established, he would then be able to seek access to the state's biological evidence, which the district court has the authority to allow under Habeas Rule 6(a). But his claim of access to that evidence is not independently cognizable outside the context of the substantive claim he hopes to assert.

The state's argument here does not conflict with the Court's decision in *Dotson*. The defendants in *Dotson* used § 1983 to challenge the constitutionality of parole eligibility procedures. *See Dotson*, 544 U.S. at 82. Success on their claims would have entitled them only to new reviews of their parole eligibility and would carry no implication that they would ultimately be entitled to release. *Id.* The purely legal issue of the constitutionality of the parole procedures at issue had no logical link to the defendants' actual parole eligibility.

In contrast, Osborne's access-to-evidence claim is inextricably entwined with the actual-innocence claim he hopes to bring. It matters little that new testing might confirm his guilt and thus would not support his innocence claim. That possibility does not sever the logical link between successful access to the evidence and his ultimate, but yet-to-be-made, claim of innocence. Osborne's *only* reason for seeking access to the state's biological evidence is so that he can later prove up the freestanding claim of innocence he hopes to make. An action under § 1983 was never intended as a mechanism to obtain discovery of evidence material to a claim not yet asserted.

II. CERTIORARI IS WARRANTED TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT THE GOVERNMENT'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE UNDER *BRADY V. MARYLAND* REQUIRES THE STATES TO PROVIDE ACCESS TO EVIDENCE FOR NEW DNA TESTING

The sole legal basis for the Ninth Circuit's decision in Osborne's case is *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *See* App. 15a-17a, 23a-28a.

Brady recognized that a defendant has a due process right to production of "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. *Brady* has since evolved into a broader doctrine, requiring the prosecution to affirmatively seek out from those acting on its behalf exculpatory and impeachment evidence that has a reasonable probability of resulting in an acquittal. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).

The exclusive rationale of the *Brady* doctrine is to ensure that a defendant receives a fair trial.[3] *Bagley*, 473 U.S. at 675 (prosecutor's "only" duty under *Brady* is "to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial"). *See also United States v. Ruiz*, 536 U.S. 622, 628 (2002); *Kyles*, 514 U.S. at 434; *United States v. Agurs*, 427 U.S. 97, 108 (1976); *Brady*, 373 U.S. at 87-88. Osborne received a fair trial and had the assistance of a competent lawyer. App. 99a-102a, 113a ff. He also had pretrial access to the biological evidence he now seeks, and he made a strategic decision not to seek independent pretrial RFLP testing, believing instead that the lower discriminating power of the state's DQA testing gave him a better chance to

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[3] This Court's only mention of the *Brady* doctrine in a postconviction context came in *Imbler v. Pachtman*, 424 U.S. 409 (1976). Addressing the issue of prosecutorial immunity under § 1983, the *Imbler* Court recognized that due process principles govern a prosecutor's duty to disclose exculpatory evidence at trial, but after trial, non-constitutional ethical standards govern any continuing duty to disclose. *Id.* at 427 n.25. This is fully consistent with the *Brady* doctrine's due process roots of ensuring that a defendant receives a fair trial. *Grayson v. King*, 460 F.3d 1328, 1337 (11th Cir. 2006) (rejecting that *Imbler* created a postconviction *Brady* right).

raise reasonable doubt.[4] App. 97a-99a. Osborne was therefore denied no rights under *Brady*, in its traditional and established pretrial application.

A. The courts of appeal are divided on this issue

The Ninth Circuit converted *Brady*'s right of access from a purely pretrial right to a postconviction right. This conversion conflicts with the law of three other circuits. The Fourth Circuit held in *Harvey v. Horan* that a defendant had no right under *Brady* to subject biological evidence to postconviction testing because he was not challenging a prosecutor's failure to produce material, exculpatory evidence that would have denied him a fair trial. *Harvey*, 278 F.3d at 378-79 (citing *Bagley*, 473 U.S. at 675-76). The court specifically noted that the defendant had received a fair trial and had been given a pretrial opportunity to test the evidence he was then seeking. *Id.* at 379.

The Eleventh Circuit reached the same conclusion in *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006). The court viewed *Brady* and its progeny as creating a duty of disclosure that applied before and during trial

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[4] The Ninth Circuit appears to have heavily discounted Osborne's decision to forgo pretrial testing because the state's criminalist "'felt that the sample was degraded.'" App. 5a-6a (quoting trial transcript), 9a. But the criminalist's opinion was offered at trial for the sole purpose of explaining why the state had not subjected the evidence to more discriminating testing. Nothing in the record suggests that this was a factor in Osborne's decision not to pursue the testing before trial, and neither Osborne nor the state made any effort to determine if the evidence was in fact too degraded for more discriminating testing. In light of Osborne's failure to make that effort, no inference favorable to him should be drawn based on the criminalist's opinion.

but not postconviction. *Id.* at 1337-38. The court concluded that the defendant, having received a fair trial, "has no valid due process right of post-conviction access to the biological evidence under *Brady*" to retest evidence, using new technology. *Id.* at 1338.

The Sixth Circuit, in an unpublished opinion, reached a similar conclusion for the same reasons: the defendant had received a fair trial and did not claim that he had been denied access to the evidence before trial. *Alley v. Key*, 2006 WL 1313364, *2 (6th Cir., May 14, 2006) (unpublished) ("*Brady* cannot be said to reach post-conviction access for DNA testing in the circumstances presented by the case before us.").

The Ninth Circuit acknowledged the conflict between its decision and *Harvey* and *Grayson*. App. 22a-23a. The court dismissed *Harvey* as "tend[ing] to conflate the right of access to evidence with the ultimate right to habeas relief" and in conflict with the court's first decision in Osborne's case, which upheld Osborne's right to use § 1983 to assert his access-to-evidence claim. *Id.* (citing App. 58a-59a). And the court dismissed both *Harvey* and *Grayson* as ignoring "the due process principles that motivated *Brady*." *Id.*

B. Because freestanding innocence claims are not legally cognizable, the Due Process Clause does not require the states to provide postconviction access to evidence for the purpose of assisting that claim

The Ninth Circuit readily acknowledged that it was placing the right of access to evidence before all other

considerations, including those preliminary issues that could immediately dispose of a substantive claim: "the testing of potentially exculpatory evidence may be given precedence over the consideration of even jurisdictional questions involving pure issues of law." App. 21a. This priority – allowing discovery before deciding dispositive preliminary issues, such as jurisdiction and the legal cognizability of a claim – is directly contrary to the policy of the rules of procedure (*see* Rule 12(b), Federal R. Civ. P.) and creates the very inefficiencies the rules are designed to avoid.

The Ninth Circuit's decision conflicts with this policy by compelling a state to give a defendant access to evidence before the state has the opportunity to test the legality of the underlying substantive claim to which the evidence would be material. The court held that Osborne's access-to-evidence claim could proceed "on the well-established assumption that his intended freestanding innocence claim will be cognizable in federal court." App. 22a. But this assumption is anything but well-established. Moreover, this assumption begs the question.

In *Herrera v. Collins* and *House v. Bell*, the Court assumed, but did not decide, that a freestanding innocence claim would be cognizable. *Herrera v. Collins*, 506 U.S. 390, 404, 417 (1993); *House v. Bell*, 547 U.S. 518, 555 (2006). The Court made the assumption in *Herrera* and *House* as a means to avoid deciding an unnecessary constitutional issue, enabling the Court to bypass the cognizability issue and reject the defendants' claims because neither defendant could meet the extraordinarily high threshold standard that would apply if a freestanding innocence claim were cognizable. *Id.* Thus, the assumption allowed the Court to *dismiss* the free-

standing innocence claims in *Herrera* and *House* without deciding whether the claims were legally cognizable.

In contrast, in Osborne's case, the Ninth Circuit assumed the existence of a freestanding innocence claim to *avoid dismissing* his access claim. The court assumed that the claim would be cognizable for the sole purpose of supporting its conclusion that the evidence Osborne seeks would be material to that claim. App. 20a-21a. This reasoning begs the question because if a freestanding innocence claim (the only claim for which the evidence Osborne seeks would be material) is not legally cognizable, then his case is subject to dismissal without even addressing his access-to-evidence claim.

The Ninth Circuit's decision to assume that a freestanding innocence claim is cognizable, rather than resolve that question on the merits, has a second and more troubling flaw: namely, the court's assumption is unsupported by existing case law. The existence of the assumed freestanding innocence claim has not been recognized by this Court, and it has been rejected by nine circuits.

The Court's "habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim." *Herrera*, 506 U.S. at 404. The Court has, however, assumed that a "truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a [capital] defendant unconstitutional" but at the same time declined to decide the issue. *Id.* at 417. *See also House*, 547 U.S. at 554-55 (making same assumption and again declining to decide).

Nine circuits have addressed the merits of the cognizability issue and concluded that a freestanding

claim of innocence is not cognizable: *David v. Hall*, 318 F.3d 843, 847-48 (1st Cir. 2003) ("The actual innocence rubric . . . has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case."); *Fielder v. Varner*, 379 F.3d 113, 122 (3d Cir. 2004) (non-capital defendant's habeas claim asserting only freestanding innocence claim was properly dismissed as not cognizable); *Rouse v. Lee*, 379 F.3d 238, 255 (4th Cir. 2003) (en banc) (freestanding "claims of actual innocence are not grounds for habeas relief even in a capital case"); *Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006) ("actual-innocence is *not* an independently cognizable federal-habeas claim" in capital case); *Zuern v. Tate*, 336 F.3d 478, 482 n.1 (6th Cir. 2003) (capital defendant's freestanding innocence claim not cognizable in federal habeas); *Johnson v. Bett*, 349 F.3d 1030, 1038 (7th Cir. 2003) (non-capital defendant's habeas claim based on newly discovered evidence "must relate to constitutional violation independent of any claim of innocence"); *Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002) (rejecting claim for habeas relief "simply because [capital defendant] claims he is innocent"); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) ("assertion of actual innocence [by capital defendant] . . . does not, standing alone, support the granting of the writ of habeas corpus"); *Brownlee v. Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002) (rejecting capital defendant's innocence claim absent claim of independent constitutional violation). *See also Coley v. Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995) (non-capital defendant's apparent factual innocence claim "is not reviewable on habeas" absent independent constitutional claim).

The Ninth Circuit did not acknowledge the existence of this conflict with its sister circuits. Rather, the court simply relied on *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc). App. 20a-21a. But in *Carriger*, the court, like this Court in *Herrera* and *House*, assumed that a freestanding innocence claim was cognizable for the purpose of *dismissing* the claim.

The Ninth Circuit's decision also conflicts with the decision of the Alaska Court of Appeals. The Alaska court, reviewing the dismissal of Osborne's state postconviction relief application, held that "at least under federal law, a defendant who has received a fair trial apparently has no due process right to present new post-conviction evidence, even when that evidence would demonstrate the defendant's innocence."[5] App. 106a (citing *Herrera*, 506 U.S. at 400; *id.* at 427-28 (Scalia, J., concurring)), 109a ("It appears, therefore, that Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence."). The Ninth Circuit did not view this as a conflict, noting only that the Alaska Court of Appeals had "observed that a prisoner 'apparently' has no federal due process right" to assert a freestanding innocence claim. App. 9a (quoting App. 105a). But read in context, the Alaska court clearly rejected a federal right; otherwise, there would have been no reason for it to consider whether the Alaska Constitution afforded Osborne the right to assert a freestanding claim. *See* App. 109a-112a.

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[5] But see *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996), holding that the imprisonment of an innocent person violates the Due Process Clause.

III. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONWIDE IMPORTANCE

This case presents important issues of federal law: (1) may a defendant use § 1983 to conduct postconviction discovery relating to a substantive claim not yet asserted and (2) does the Due Process Clause require the state to provide postconviction access to evidence relating to a claim that is not legally cognizable. Not only has the Ninth Circuit created a new constitutional right, it has created a standalone right to evidence that is fundamentally at odds with the traditional principle of materiality that links evidence to a pending substantive claim.

In addition, and more important, the Ninth Circuit's decision paid little more than lip service to the states' interest in finality of criminal judgments, observing that the "writ of habeas corpus overrides [finality] considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner," *McCleskey v. Zant*, 499 U.S. 467, 492-93, 495 (1991),[6] *quoted in* App. 42a., and concluding that the "State's conception of finality would reverse these priorities." App. 42a.

But federal habeas review will trump finality *only* in the context of a well-pleaded constitutional claim, which is absent in this case. Thus the structural and procedural limitations inherent in the invocation of federal habeas jurisdiction, absent here, operate to secure some measure of finality on behalf of the

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[6] *McCleskey* recognized that actual innocence may establish a miscarriage of justice that would satisfy the cause-and-prejudice requirement and warrant consideration of a successive habeas petition. *McCleskey*, 499 U.S. at 494-96.

states. Moreover, the Court has acknowledged the "very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases." *Herrera*, 506 U.S. at 417. And in recognition of the "enormous burden" that would result if freestanding claims were successful, "the threshold showing for such an assumed right [to assert a freestanding innocence claim] would necessarily be extraordinarily high." *Id.* The states' interest in finality would receive due consideration by requiring that access-to-evidence issues be resolved only in the context of ongoing litigation that raises a cognizable substantive claim.

The Ninth Circuit's decision will have a potentially enormous impact on the states, particularly in view of the fact that this is a non-capital case. *Cf. Herrera*, 506 U.S. at 417 (assuming that actual innocence would render execution of capital defendant unconstitutional). In light of the progress in forensic DNA technology and potential probative force of DNA evidence, it is doubtful that a state can now ever dispose of DNA evidence in good faith. *Cf. Arizona v. Youngblood*, 488 U.S. 51, 58 (1989) (state's disposal of evidence will not violate Due Process Clause unless defendant can show bad faith). Thus the creation of a broad, freestanding *constitutional right* of postconviction access to evidence appears to impose a concomitant duty on the states to retain evidence in anticipation of the next technological breakthrough. For example, if new testing were to include Osborne as the donor of the DNA inside the condom, the state would arguably have a duty to retain the condom so it would be accessible to Osborne in the event that some new test method would later become available that would be even more discriminating than what is presently available. Linking the right of access to a

cognizable substantive claim would circumscribe the state's good faith duty to retain evidence as a result of limitation statutes and other procedural bars.

And as discussed above, there is a circuit split regarding three important aspects of the Ninth Circuit's decision in this case. First, three circuits have rejected the use of § 1983 to obtain postconviction access to evidence for the purpose of conducting discovery for a future attack on the defendant's conviction. Second, no other circuit has recognized a *Brady*-like right in a postconviction context, and three circuits have specifically rejected such a right in that context. And third, the circuit courts, including the Ninth Circuit, have unanimously held that freestanding innocence claims, the only claim for which the evidence Osborne seeks would be material, are not cognizable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 27, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 06-35875

WILLIAM G. OSBORNE,
Plaintiff-Appellee,
v.
DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT; ADRIENNE BACHMAN,* DISTRICT ATTORNEY,
Defendants-Appellants.

Argued and Submitted Oct. 10, 2007
Filed April 2, 2008

Before ALFRED T. GOODWIN, MELVIN BRUNETTI, and WILLIAM A. FLETCHER, *Circuit Judges.*

OPINION

BRUNETTI, *Circuit Judge*:

William Osborne, an Alaska prisoner, brought this action under 42 U.S.C. § 1983 to compel the District Attorney's Office in Anchorage to allow him post-conviction access to biological evidence-semen from a used condom and two hairs-that was used to convict him in 1994 of kidnapping and sexual assault. Osborne, who maintains his factual innocence,

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* Adrienne Bachman is substituted for former District Attorney Susan A. Parkes as appellant pursuant to Fed. R. App. P. 43(c)(2).

intends to subject the evidence, at his expense, to STR and mitochondrial DNA testing, methods that were unavailable at the time of his trial and are capable of conclusively excluding him as the source of the DNA.

In a prior appeal, *Osborne v. District Attorney's Office*, 423 F.3d 10501056 (9th Cir.2005) (hereinafter *Osborne I*),[1] we held that *Heck v. Humphrey* does not bar Osborne's § 1983 action because, even if successful, it will not necessarily demonstrate the invalidity of his conviction. We also remanded for the district court to address in the first instance whether the denial of access to the evidence violates Osborne's federally protected rights.

In this post-remand appeal, we affirm the judgment of the district court that, under the unique and specific facts of this case and assuming the availability of the evidence in question, Osborne has a limited due process right of access to the evidence for purposes of post-conviction DNA testing, which might either confirm his guilt or provide strong evidence upon which he may seek post-conviction relief.

I

A

Following a March 1994 jury trial in Alaska Superior Court, Osborne was convicted of kidnapping, assault, and sexual assault, and was sentenced to 26 years imprisonment, with 5 years suspended. The charges arose from a March 1993 incident in which

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[1] There are three prior "*Osborne*" appellate opinions, one by this court and two by the Alaska Court of Appeals. The two state opinions are both titled *Osborne v. State* and will be referred to as *State I* and *II*.

the victim, a female prostitute named K.G., after agreeing to perform fellatio on two male clients, was driven to a secluded area of Anchorage and brutally attacked. *See generally Jackson v. State*, Nos. A-5276, A-5329, 1996 WL 33686444, at *1 (Alaska Ct.App. Feb.7, 1996) (consolidated direct appeal).

At gunpoint, K.G. was forced to perform fellatio on the driver while the passenger vaginally penetrated her with his finger and penis. The driver did not wear a condom, but the passenger wore a blue condom that K.G. had brought with her. When K.G. later refused their orders to get out of the car, the driver hit K.G. in the head with the gun, and at the driver's urging the passenger choked her. K.G. eventually attempted to flee, but her attackers pursued and beat her with an axe handle. As she lay in the snow in the fetal position and played dead, she heard the gun fire and felt a bullet graze her head. Though she could not see her attackers' faces, judging from their pants and footwear she believed it was the passenger who shot her. The attackers then partially covered K.G. with snow and fled in the car, leaving her for dead.

K.G. heard the car drive away but continued to lie under the snow until she was sure her attackers had gone. She then got up, walked to the main road, flagged down a passing car, told its occupants what had happened, and—hoping to avoid the police—asked only for a ride home. The following day, however, a neighbor of one of the car's occupants notified the police, who contacted K.G. Though initially uncooperative, K.G. eventually described the incident.

K.G. underwent a physical examination, during which hair and blood samples were collected. A vaginal examination was not performed, however, because the passenger-rapist had worn a condom and

K.G. had bathed repeatedly since the attack. At the crime scene, Anchorage Police recovered from the snow a used blue condom, part of a condom wrapper, a spent shell casing, and two pairs of K.G.'s grey knit pants stained with blood. The blue condom and shell casing were found "very near" each other and in close proximity to bloody patches of snow and the disturbed berm of snow where K.G. had been partially buried. A layer of new snow, which had fallen the morning after the attack, aided the police in distinguishing between tire tracks made the night before by the assailants' car and tracks made the following day by two known vehicles. Those cars were owned by K.G.'s rescuers and their neighbor, who had visited the crime scene the day after the incident before contacting the police.

A week later, military police stopped Dexter Jackson for a traffic infraction. When Jackson opened his glove box to retrieve his registration, the officer spotted a gun case, which proved to hold a .380 caliber pistol. A further search of the car revealed a box of ammunition and a pocketknife. Observing that Jackson, his car, and his passenger at the time (who was not Osborne) resembled composite sketches that had been circulated after the assault on K.G., the military police contacted the Anchorage Police, whom Jackson told that Osborne was his accomplice on the night of the assault.

K.G. later identified Jackson and Osborne from photographic arrays. In identifying Jackson's accomplice, K.G. indicated that Osborne's and another person's photos were the "most familiar" to her and Osborne was "most likely" to have been the passenger who raped and shot her. K.G. also identified Jackson's car, and the police matched tire tracks at

the crime scene to Jackson's car. K.G. also identified the pocketknife found in Jackson's car as hers, and ballistics tied the spent shell casing found at the crime scene to Jackson's pistol.

The State's crime lab subjected sperm found in the used condom to "DQ Alpha" DNA testing, which, similar to ABO blood typing, reveals the alleles present at a single genetic locus. The results excluded K.G., Jackson, and James Hunter (presumably Jackson's passenger when he was arrested), and showed that the sperm had the same DQ Alpha type as Osborne. That same DQ Alpha type is shared, however, by 14.7 to 16 percent of African Americans and thus can be expected in one of every 6 or 7 black men.

A DNA testing method called "RFLP," which was relatively more discriminating than DQ Alpha typing but, according to the State, "not quite as discriminating as the testing [Osborne] now seeks to conduct," was also available pre-trial but was not conducted on the sperm.[2] The State's crime lab expert considered sending out the sample for more dis-

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[2] The State's concessions that the RFLP DNA testing available pre-trial is "not quite as discriminating as" the STR and mitochondrial DNA testing Osborne now seeks, and that these methods were not available pre-trial, is an apparent reversal of the State's representation to the state court that "the DNA testing that Osborne proposes to perform on this evidence existed at the time of Osborne's trial, and . . . Osborne's trial attorney was aware of this and consciously chose not to seek more specific testing." *Osborne v. State*, 110 P.3d 986, 992 (Alaska Ct.App.2005). According to the Superior Court's dismissal order that was on appeal in that case, Osborne's state claims involved (1) ineffective assistance at trial based on counsel's failure to pursue "RFLP" testing, and (2) a request for post-conviction "mitochondrial DNA" testing.

criminating testing, which was then available through the FBI, but did not because, at least at that time, more discriminating testing required a better quality sample than was provided in the condom and the expert "felt that the sample was degraded." Defense counsel also considered and rejected the option.

Counsel met with the DNA expert from the State crime lab, reviewed DNA research articles, and conferred with a Fairbanks public defender who was litigating the scientific basis of DNA testing. But defense counsel's explanation for not pursuing pretrial RFLP testing differs from the State's expert's reasons. According to her post-conviction affidavit, counsel disbelieved Osborne's statement that he did not commit the crime, was concerned about a more inculpatory result nullifying Osborne's misidentification defense, and concluded that "Osborne was in a strategically better position without RFLP DNA testing," especially given the inherent uncertainty in the DQ Alpha results.

The police also recovered two pubic hairs: one from the used blue condom, and a second from K.G.'s sweatshirt, which she had lain on top of during the sexual assault. DQ Alpha typing of these hairs was unsuccessful, likely because the sample was too small for analysis. Based on microscopic analysis, however, the State's expert opined that both hairs were "dissimilar" to Jackson and Hunter but were "consistent" with having come from Osborne because they "exhibited the same microscopic features" as Osborne's pubic hair sample. Additional hairs having "negroid features" were also found on K.G.'s clothing but were inconsistent with any of the suspects investigated by police.

Osborne and Jackson were tried jointly before a jury. Osborne presented alibi and mistaken identity defenses, specifically arguing that there was too little time for him to have participated in the crime and pointing out flaws in K.G.'s identification. K.G. was not wearing her glasses on the night of the attack. She described the passenger who attacked her as black, between 25 to 30 years old, 6 feet tall, weighing 180-190 pounds, clean shaven, having his hair shaved on the sides and longer on top, and not wearing any jewelry. Osborne actually was 20 years old, weighed 155 pounds, and had a mustache. K.G.'s identification of Osborne was also cross-racial, Osborne being black and K.G. being white. Nonetheless, at trial K.G. pointed to Osborne and identified him as the passenger who attacked her.

Besides the biological and victim-eyewitness testimony, there was also circumstantial evidence of Osborne's culpability. Paper tickets from the Space Station arcade, where Osborne had been before the crime, were found in Jackson's car. One group of witnesses saw Osborne get into Jackson's car before the time of the crime, and another group saw Osborne with Jackson after the crime and reported seeing blood on Osborne's clothing. Apparently, no trace evidence of blood on Osborne's clothing was admitted at trial, however.

The jury rejected Osborne's mistaken identity and alibi defenses and convicted him of kidnapping, first-degree assault, and two counts of first-degree sexual assault, although he was acquitted of two counts of attempted first-degree murder and one count of sexual assault. On direct appeal, the Alaska Court of Appeals rejected Osborne's insufficient evidence claim and his other challenges and affirmed his conviction.

Jackson, 1996 WL 33686444, at *7-8. Osborne did not seek direct review in the Alaska Supreme Court.

B

Osborne next filed an application for post-conviction relief in Alaska Superior Court, arguing first that his trial counsel was ineffective for failing to pursue RFLP testing, which was a potentially more precise type of DNA testing and was available at the time; and second that he has a due process right, under either the state or federal constitution, to have evidence retested using DNA testing methods that were not available until after his trial. In June 2002, the Superior Court denied his application. Osborne not only appealed that decision to the Alaska Court of Appeals, he also subsequently filed the underlying § 1983 action in federal district court.

While his state appeal and federal action were pending, in April 2004 Osborne also applied for discretionary parole with the Alaska Board of Parole. In his written application, Osborne confessed to participating in the attack on K.G. and described his actions in detail. He also confessed at his August 2005 hearing before the Parole Board and stated that he had told his mother and lawyer the truth about the incident. But despite his efforts at accepting responsibility, Osborne was denied parole.

Osborne also lost his state appeal. In reviewing the Superior Court's dismissal of Osborne's petition for post-conviction relief, the Alaska Court of Appeals affirmed in part, remanded in part for further proceedings, and retained jurisdiction in the interim. *Osborne v. State*, 110 P.3d 986, 995-96 (Alaska Ct. App.2005) (hereinafter *State I*). The court rejected Osborne's ineffective assistance claim, holding that

he failed to establish deficient performance. Like the Superior Court, the Court of Appeals noted that trial counsel "researched and considered" RFLP DNA testing, but decided against it for fear that a more discriminating test would further inculpate Osborne. That decision, the court concluded, was a "tactical" one that fell within the permissible range of attorney competence. *Id.* at 991-92. The court made no mention of the State's DNA expert's trial testimony that the sperm sample was too degraded to even permit RFLP testing.

As to Osborne's due process claim, the Court of Appeals initially observed that a prisoner "apparently" has no federal due process right to present new post-conviction evidence to establish a freestanding claim of factual innocence, absent an underlying constitutional defect at trial. *Id.* at 993, 995. "[A]s a matter of Alaska constitutional law," however, the court was "reluctant to hold that Alaska law offers no remedy to defendants who could prove their factual innocence," and it adopted a three-part test, which had been adopted by several other states, for cases in which defendants seek post-conviction DNA testing. *Id.* at 995. The court therefore remanded to the Superior Court for the limited purpose of determining whether Osborne could satisfy the test and, if so, whether Osborne's claim was otherwise procedurally barred under Alaska law. *Id.*

The remand proceedings in Alaska Superior Court were still pending when we decided *Osborne I* in September 2005. Eight months later, the Alaska Superior Court held that Osborne failed to satisfy the three factors set forth by the Alaska Court of Appeals in *State I* and therefore denied Osborne's request for DNA testing. The Superior Count found that (1)

"Osborne's conviction did not rest primarily upon eyewitness identification evidence," (2) "no . . . demonstrable doubt as to Mr. Osborne's identification [as the perpetrator] has been established," and (3) "[e]ven assuming that the DNA of either the pubic hair or the semen was tested and found not to be Mr. Osborne's, . . . such evidence, if obtained, would not be conclusively exculpatory."

In *Osborne v. State*, 163 P.3d 973, 979-81 (Alaska Ct.App.2007) (hereinafter *State II*), the Alaska Court of Appeals affirmed those three findings and the Superior Court's underlying factual findings and reasoning. Although Osborne subsequently filed a petition for review in the Alaska Supreme Court, which was pending when we heard oral argument in this case, that petition has since been denied. *Osborne v. State*, No. S-12799 (Alaska Jan. 22, 2008).

C

In June 2003—one year after the Alaska Superior Court first denied Osborne's state petition for post-conviction relief, and one year before Osborne filed his application for discretionary parole in which he provided his written confession—Osborne filed the underlying action under 42 U.S.C. § 1983 alleging that the Anchorage District Attorney's Office, then-District Attorney Susan Parkes, the Anchorage Police Department, and then-Chief of Police Walt Monegan violated his rights under the United States Constitution by denying him post-conviction access to evidence for DNA testing. Specifically, he alleges violations of: (1) his due process right to access exculpatory evidence; (2) his due process right to demonstrate actual innocence; (3) his Eighth Amendment right to be free from cruel and unusual punishment; (4) his right to a fair clemency hearing; (5) his Sixth

Amendment rights to confrontation and compulsory process; and (6) his due process and equal protection rights to meaningful access to the courts. He requests as a remedy "the release of the biological evidence"—the semen and pubic hair from the blue condom and the pubic hair from K.G.'s sweater—and "the transfer of such evidence for DNA testing."

Osborne's complaint explains that he intends to subject the evidence to two forms of DNA testing: Short Tandem Repeat ("STR") analysis and Mitochondrial DNA ("mtDNA") analysis. Unlike the DQ Alpha analysis used at trial, which looks to only one genetic locus, STR analysis examines the alleles at 13 genetic loci. Thus, it has the power to produce a far more specific genetic profile—one shared by one in a billion people, rather than one in 6 or 7. *See generally United States v. Kincade*, 379 F.3d 813, 818-19 (9th Cir.2004) (en banc) (discussing the science and accuracy of STR testing).

Moreover, if the DNA samples are unsuitable for STR analysis, Osborne intends to submit them to mtDNA analysis. STR analysis, like DQ Alpha analysis, examines DNA found in the nucleus, and is incapable of reaching a result from a hair sample unless the root or follicle is attached. By contrast, mtDNA analysis looks to DNA found in the mitochondria, and does not require the presence of a root or follicle. Osborne asserts that neither STR nor mtDNA analysis was available at trial and that he will have the testing performed at his expense.

In 2003, the State filed motions to dismiss Osborne's § 1983 action, arguing that Osborne's simultaneously pending state petition for post-conviction relief required federal court abstention under *Younger v. Harris*, 401 U.S. 37 (1971), and, alternatively, that

under *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), Osborne's claims are not cognizable in a § 1983 action and may be brought only in a habeas proceeding. The district court granted the motion, holding that *Younger* abstention was inapplicable but that dismissal was required under *Heck* because Osborne sought to "set the stage" for an attack on his conviction.

Osborne appealed, and in *Osborne I* we reversed, holding that *Heck* does not bar a prisoner's § 1983 action seeking post-conviction access to biological evidence for purposes of DNA testing because, even if successful, the action will not necessarily demonstrate the invalidity of his conviction. *Osborne v. District Attorney's Office*, 423 F.3d 1050, 1056 (9th Cir.2005). We observed that "success would yield only *access* to the evidence—nothing more," "there is a significant chance that the results will either confirm or have no effect on the validity of Osborne's confinement" because "further DNA analysis may prove exculpatory, inculpatory, or inconclusive," and "even if the results exonerate Osborne, a separate action-alleging a separate constitutional violation altogether—would be required to overturn his conviction." *Id.* at 1054-55. Expressing no opinion on the merits of Osborne's claims, we remanded to the district court to address in the first instance whether Osborne has been deprived of a federally protected right. *Id.* at 1056.

On remand, Osborne moved for summary judgment on his § 1983 claims. Days later, Osborne along with the Anchorage Police Department and Chief of Police Monegan filed a stipulation dismissing those two defendants in exchange for their withdrawal of opposition to Osborne's claim for DNA testing and their

agreement to make the evidence available as required by any final court order or upon direction from the State of Alaska, Department of Law.

The remaining "State" defendants—the District Attorney and the District Attorney's Office—filed both an opposition to Osborne's summary judgment motion and a motion to stay proceedings based on the *Colorado River* and *Pullman* abstention doctrines. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The district court denied the abstention motion, and the State has not appealed that denial.

Months later, and just days after the Alaska Superior Court issued its Findings on Remand from *State I*, the State filed a cross-motion for summary judgment. The State asserted, in addition to its arguments opposing Osborne's motion, that the Superior Court's factual findings were entitled to preclusive effect in federal court and otherwise support the State's position.

This time the district court ruled in Osborne's favor. *Osborne v. Dist. Attorney's Office*, 445 F.Supp.2d 1079 (D.Alaska 2006). After initially concluding that the Alaska Court of Appeals' decision in *State I* "is not binding upon this Court," the district court held that "there *does* exist, *under the unique and specific facts presented,* a very limited constitutional right to the testing sought." *Id.* at 1080-81 (citing *Harvey v. Horan* (*Harvey II*), 285 F.3d 298, 325 (4th Cir.2002) (Luttig, J., respecting the denial of rehearing en banc); *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir.1992); and *Moore v. Lockyer*, No. 04-1952, 2005 WL 2334350, at *8, *9 (N.D.Cal. Sept.23, 2005)).

The court continued:

> Significant to this conclusion is the fact that the testing sought was *not* available to Plaintiff . . . at the time of trial, the fact that the testing sought can be easily performed without cost or prejudice to the Government, and the fact that the test results can either confirm Plaintiff's guilt or provide evidence upon which Plaintiff might seek a new trial. In this regard, and although the Court makes no findings as to whether Plaintiff would be entitled to a new trial, the Court concludes that a favorable result for Plaintiff might have a significant impact on a fact-finder[']s evaluation of guilt or innocence.
>
> The Court also concludes that equity and fundamental notions of fairness argue in favor of the relief Plaintiff seeks; especially, when considered in the appropriate context, e.g., the Government has no legitimate interest in punishing the innocent.
>
> The Court's conclusion in this matter assumes the availability of the evidence sought. If the evidence were no longer available, for any legitimate reason, there exists no right to test it and no basis upon which Plaintiff could pursue the issue further.

Id. at 1081-82 (footnote omitted).

We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* the district court's rulings on cross-motions for summary judgment. *Phillips v. Hust*, 477 F.3d 1070, 1075 (9th Cir.2007). We also review *de novo* the legal question of whether there exists a post-conviction right of access to evidence for DNA testing. *Cf. id.* at 1079. Whether the State's refusal to grant

access to evidence violates Osborne's constitutional due process right is also reviewed *de novo* as a mixed question of fact and law. *Cf. United States v. Duff*, 831 F.2d 176, 177 (9th Cir.1987).

II

"It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Yet *Ritchie*, like the rest of the Supreme Court's cases involving *Brady* rights, involved only the right to *pre-trial* disclosure. *See id.* (citing *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), both of which involved only pre-trial suppression); *cf. id.* at 60 (describing the duty to disclose as "ongoing," yet simultaneously referencing only reconsideration of disclosure "as the proceedings progress" to ensure "the fairness of the trial"). The more novel question presented in this case is whether, and the extent to which, the Due Process Clause of the Fourteenth Amendment extends the government's duty to disclose (or the defendant's right of access) to *post-conviction* proceedings.

As both parties and the district court have recognized, this circuit's closest precedent is *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir.1992), in which we ordered the disclosure of potentially-exculpatory semen evidence in a habeas corpus proceeding where testing of the evidence was potentially material to a so-called "gateway" showing of actual innocence. Rather than relying on general discovery

principles or a pre-trial *Brady* right, we expressly applied *Brady* as a post-conviction right, stating:

> [W]e believe the state is under an obligation to come forward with any exculpatory semen evidence in its possession. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, . . . (1963). We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding.

Thomas, 979 F.2d at 749-50. Although the State contends that *Thomas* is distinguishable on a variety of grounds, we find none of those arguments persuasive and conclude that *Thomas* is controlling here despite the factual and procedural differences.

For instance, the State argues that *Thomas* involved pre-trial suppression in addition to post-conviction suppression, whereas Osborne had full pre-trial access to the biological evidence in question for purposes of DNA testing "using the best technology available at that time." Moreover, the State argues, in *Thomas* the petitioner claimed ineffective assistance based on trial counsel's failure to test the evidence, whereas the Alaska state courts have already rejected Osborne's similar ineffective assistance claim. But this is all rather beside the point given our reasoning in *Thomas*. It is patent in the above-quoted passage that in granting the petitioner a post-conviction right of access we expressly applied *Brady* as a post-trial right and specifically disclaimed reliance on a pre-trial *Brady* violation or any other pre-trial violation. Pursuant to *Thomas*, the more material facts here are that the STR and mtDNA testing methods now being requested were in fact not

accessible to Osborne pre-trial, whether due to suppression, ineffective assistance of counsel, or historical scientific limitations, such methods are far more discriminating than the testing methods that were available pre-trial, such that only now can Osborne be identified or excluded as the source of the DNA to a virtual certainty; and, for the same reasons, these newly available methods have the potential to provide strong evidence upon which Osborne might seek post-conviction relief. *Cf. Riofta v. State*, 134 Wash. App. 669, 142 P.3d 193, 200, 203 (Wash.Ct.App.2006) (distinguishing *Thomas* because Riofta had pre-trial access to the evidence and to testing "of equal accuracy" to that sought post-trial; also distinguishing a New Jersey case in which "DNA testing was not widely accepted and was expensive at the time of the . . . defendant's trial").

At the time of briefing, the State further contended that the "Catch-22" that was present in *Thomas* does not exist here because Osborne had an alternative avenue for relief in state court, which he was at that time pursuing. As the Alaska Supreme Court has since denied Osborne's petition for review in *Osborne v. State*, No. S-12799 (Alaska Jan. 22, 2008), the State's argument is probably moot. But even if Osborne still had some available state remedy that he could pursue, the Catch-22 would remain. In both state and federal court the State has opposed Osborne's access-to-evidence claim based on the argument that Osborne cannot prove his actual innocence; yet Osborne needs access to the evidence to make that very showing. *Cf. Thomas*, 979 F.2d at 749. Although the State further contends that even assuming favorable test results Osborne could not make a sufficient showing of actual innocence, that argument is out of place. The argument is certainly

relevant to the ultimate question of whether, given the state of the evidentiary record, the requested DNA testing would be sufficiently material to require disclosure in this case. *See infra* Part IV. But the State's argument is irrelevant to the instant threshold issue of whether Osborne can even begin to invoke *Thomas* as establishing a post-conviction *Brady* right. Moreover, to the extent the existence of parallel state litigation might have raised abstention concerns, the State's motions to dismiss or stay proceedings based on *Younger, Colorado River*, and *Pullman* abstention were all denied by the district court, and the State failed to reassert its abstention arguments in either *Osborne I* or the instant appeal.

The State finally contends that *Thomas* is distinguishable because Osborne does not have an ongoing federal habeas action to which the requested DNA testing would be material. According to the State, such a limitation on *Thomas* is necessary to prevent *Brady* from applying "in the abstract and in perpetuity." We disagree and reject the notion that *Thomas*' recognition of a post-conviction *Brady* right is inapplicable per se in the absence of an ongoing habeas proceeding.

While recognizing that Osborne's sole purpose in bringing the underlying § 1983 action is to obtain post-conviction access to potentially exculpatory evidence and thereby "to 'facilitate' or 'set the stage' for a future attack on his conviction," in *Osborne I* we specifically rejected the State's position that a post-conviction access-to-evidence claim must be brought in habeas rather than under § 1983, 423 F.3d at 1055. Yet that would be the necessary consequence of the State's proposed limitation of *Thomas*. The purportedly mandatory habeas action would render

any § 1983 action for access to evidence superfluous, leaving the habeas action as the exclusive vehicle for asserting *Thomas* rights. Thus, the State's proposed limitation of *Thomas* does little more than rehash in different clothing the already rejected contentions that Osborne has failed to state a claim under § 1983 and "that a claim which *can* be brought in habeas *must* be brought in habeas." *Id.*

Furthermore, Osborne's access-to-evidence claim has been pursued without undue delay and is specifically intended to support an application for post-conviction relief. Osborne has declared in his § 1983 complaint his intention, once he obtains the requested DNA testing, to file a petition for post-conviction relief based on a "freestanding" claim of actual innocence—*i.e.*, despite the lack of any constitutional error at his trial, his incarceration is unconstitutional due to actual innocence-which Osborne might bring in either state or federal court.

Under Alaska law Osborne appears to have at least a potentially viable opportunity of bringing a freestanding actual innocence claim in a second or successive petition for post-conviction relief. However unfavorable the court's rejection of Osborne's first petition in *State II* may be, his state law options are not foreclosed entirely. In a concurrence, a two-judge majority stated that, regardless of any otherwise applicable procedural bars (presumably including those against successive petitions), the Alaska Constitution might require court intervention if a defendant were to present "clear genetic evidence of [his] innocence," and"[i]f Osborne could show that he were in fact innocent, it would be unconscionable to punish him." *State II*, 163 P.3d at 984-85 (Mannheimer, J., joined by Coats, C.J., concurring). Thus, despite the

improbability of success on the merits given the court's findings regarding the expected immateriality of the requested DNA testing, if Osborne's hunt for new evidence exceeds the state courts' expectations (which remains a possibility, *see infra* Part IV.B) his actual innocence claim might be cognizable under the authority of Judge Mannheimer's concurrence.

Federal law presents a similar opportunity. The State would take the position that a freestanding actual innocence claim is not cognizable under federal law; however, the State also concedes that it is presently an open question. In *Herrera v. Collins*, 506 U.S. 390, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the Supreme Court assumed without deciding that such a claim is possible. And in *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), the Court again declined to resolve "the question left open in *Herrera* "in such a way as to suggest that it will remain unanswered until it is squarely presented by a petitioner actually making a persuasive showing of actual innocence. *Id.* at 554-55 (concluding that "whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it"). The same might be said of the question of whether there should be a distinction between capital and non-capital cases, although *Herrera* did suggest equal treatment. *See Herrera*, 506 U.S. at 405 ("[W]e have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus.'" Quoting *Murray v. Giarratano*, 492 U.S. 1, 9, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (plurality opinion))).

In this circuit we not only have assumed that freestanding innocence claims are possible but also have articulated a minimum standard: "a habeas peti-

tioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir.1997) (en banc); *see also Jackson v. Calderon*, 211 F.3d 1148, 1164-65 (9th Cir.2000).

In resolving the instant appeal, we need not decide the open questions surrounding freestanding actual innocence claims. Instead, we assume for the sake of argument that such claims are cognizable in federal habeas proceedings in both capital and non-capital cases under the standard set forth in *Carriger*.

Such a claim is not yet before us; it would require the filing of "a separate action—alleging a separate constitutional violation altogether." *Osborne I*, 423 F.3d at 1055. Also, even where an actual innocence claim has been filed, *Herrera, House, Carriger*, and *Jackson* all support the practice of first resolving whether a petitioner has made an adequate evidentiary showing of actual innocence before reaching the constitutional question of whether freestanding innocence claims are cognizable in habeas. And under *Majoy v. Roe*, 296 F.3d 770 (9th Cir.2002), the testing of potentially exculpatory evidence may be given precedence over the consideration of even jurisdictional questions involving pure issues of law.

In *Majoy*, we held that the district court should first order that testing be conducted, hold an evidentiary hearing to permit full development of the facts supporting a "gateway" actual innocence claim under *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), and determine whether that claim was factually meritorious, all before considering whether the claim was jurisdictionally barred. *Majoy*, 296 F.3d at 776-77. We reasoned that the

issue of whether a gateway actual innocence claim provides a constitutional exception to AEDPA's statute of limitations was such an "important legal question" that it "is not appropriately addressed by us in a hypothetical context," particularly given the "'fact-intensive nature of this [actual innocence] inquiry, together with the District Court's ability to'" obtain the necessary evidence. *Id.* at 777 (quoting *Schlup*, 513 U.S. at 332). By extension, until Osborne has actually brought an actual innocence claim and has been given the opportunity to develop the facts supporting it, Osborne's access-to-evidence claim may proceed on the well-established assumption that his intended freestanding innocence claim will be cognizable in federal court.

There are two notable differences between the out-of-circuit and district court cases that do not recognize a post-conviction right of access to evidence and those that do. First, the former tend to conflate the right of access to evidence with the ultimate right to habeas relief. *See, e.g., State I*, 110 P.3d at 992, 993 (noting that Osborne claims a right of access to evidence, but analyzing whether *Herrera* permits a claim of actual innocence based on new evidence); *Harvey v. Horan* (*Harvey I*), 278 F.3d 370, 375 (4th Cir.2002) (dismissing under *Heck*). The latter distinguish the two actions. *See, e.g., Harvey v. Horan* (*Harvey II*), 285 F.3d 298, 322-24 (4th Cir.2002) (Luttig, J., respecting the denial of rehearing en banc).

Second, courts denying a post-conviction right of access read *Brady* and its progeny as applying only as a trial right. *E.g., Grayson v. King*, 460 F.3d 1328, 1337, 1342 (11th Cir.2006) (ultimately limiting its holding to "the particular circumstances of this case"); *Harvey I*, 278 F.3d at 378-79. By contrast, courts

recognizing a post-conviction right have done so not necessarily based on *Brady* itself but based on the due process principles that motivated *Brady*, including fundamental fairness, the prosecutor's obligation to do justice rather than simply obtain convictions, and the "constitutional imperatives of 'protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.'" *Wade v. Brady*, 460 F.Supp.2d 226, 246 (D.Mass.2006) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)); *see also Harvey II*, 285 F.3d at 316-18 (Luttig, J., respecting the denial of rehearing en banc); *Moore v. Lockyer*, 2005 WL 2334350, at *8 (N.D.Cal. Sept.23, 2005), *appeal docketed*, No. 06-15016 (9th Cir. argued Oct. 15, 2007).

This circuit has already staked out positions on both of these issues. In *Osborne I*, 423 F.3d at 1054-55, we drew a sharp distinction between access-to-evidence and habeas claims in holding that Osborne's access claim is not barred by *Heck v. Humphrey*. And in *Thomas*, 979 F.2d at 749-50, we expressly applied *Brady* as a post-conviction right in a habeas proceeding based on the requirements of fundamental fairness. Faced now with the argument that *Thomas* should be limited to cases with ongoing habeas petitions, we reject that view and hold that Osborne is entitled to assert in this § 1983 action the due process right to post-conviction access to potentially exculpatory DNA evidence that we recognized in *Thomas*.

III

The State alternatively contends that, even if there is a post-conviction right of access, the scope of the right recognized by the district court is too broad. It proposes a narrower standard for judging the materiality of evidence favorable to Osborne. In the State's

view, before it is obligated to disclose any evidence post-conviction, Osborne should be required to satisfy the extraordinarily high standard of proof that applies to freestanding claims of actual innocence. Thus, under our case law, Osborne would be required to "go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger*, 132 F.3d at 476; *see also Jackson*, 211 F.3d at 1164. We disagree.

The fundamental flaw in the State's position is that it effectively equates Osborne's access-to-evidence claim with a habeas claim. Under the State's conception, Osborne would have to satisfy the same actual innocence standard in order to merely obtain potentially exculpatory evidence as he would in order to actually overturn his conviction. The only difference is in the factual predicate: we would analyze Osborne's access claim taking into account the eventuality that further DNA testing will be favorable to Osborne, whereas habeas relief would require the actual results. The application of *Carriger's* legal standard, however, would otherwise be identical.

The State is getting ahead of itself. Obtaining post-conviction access to evidence is not habeas relief. And requiring Osborne to demonstrate that he would be entitled to habeas relief if the test results are favorable in order even to conduct such testing is fundamentally inconsistent with *Brady*, *Thomas*, and *Osborne I*. Under these authorities, the most stringent materiality standard for simply obtaining post-conviction access to evidence must be more lenient than the standard of proof Osborne will ultimately have to satisfy in order to obtain habeas relief.

While *Brady* ensures a fair trial, a defendant's right to pre-trial disclosure under *Brady* is not condi-

tioned on his ability to demonstrate that he *would* or even *probably would* prevail at trial if the evidence were disclosed. Rather, disclosure is required if there is a "reasonable probability" of a more favorable result at trial, and "the adjective is important." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). As the Supreme Court explained in *Kyles*, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* Nor is it "a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35. Instead, materiality for *Brady* purposes is established "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

In *Thomas*, we extended *Brady* as supporting a habeas petitioner's post-conviction right to obtain access to semen evidence for purposes of DNA testing. 979 F.2d at 749-50.While we did not expressly adopt *Brady's* materiality standard for post-conviction access claims or otherwise define the applicable materiality standard, our decision was in general accordance with the principles underlying *Brady* materiality. Despite the fact that the petitioner ultimately needed the semen evidence in order to establish a *Schlup* "gateway" claim of actual innocence for purposes of overcoming a procedural default, we did not condition the petitioner's right of access on his ability to first demonstrate that favorable test results would in fact enable the petitioner to make a colorable showing of actual innocence.

Instead, we merely noted that "[a] semen sample, or tests thereof, *might* enable him to make such a showing," "[i]n light of the obvious exculpatory *potential* of semen evidence in a sexual assault case." *Id.* at 749, 750 n. 2 (emphasis added). We put off analyzing the complete factual basis for petitioner's actual innocence claim until the evidence, if it even still existed, was actually produced and tested. *Id.* at 750.

Similarly, in *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997), we held that a habeas petitioner was statutorily entitled to post-conviction testing of physical evidence and other discovery because such "discovery is essential for Jones to *develop fully* his ineffective assistance of counsel claim," and "the test results *may* establish the prejudice required to make out such a claim." *Id.* at 1009 (emphasis added). And in *Majoy*, we found sufficient "the *distinct possibility* that given the opportunity, Majoy *may be able* to muster a *plausible* factual case meeting the exacting gateway standard [of actual innocence] established by the Supreme Court in *Schlup*." 296 F.3d at 775 (emphasis added).

In *Osborne I*, we did not address the standards Osborne might have to satisfy in order to prevail on his access-to-evidence claim. But our decision that *Heck v. Humphrey* does not bar Osborne's § 1983 action was based on the rationale that Osborne's access-to-evidence claim is not the functional equivalent of a habeas petition because it would not necessarily demonstrate the invalidity of his conviction. Indeed, "a separate action-alleging a separate constitutional violation altogether-would be required to overturn his conviction." *Osborne I*, 423 F.3d at 1055. Nonetheless, rather than allow the objective facts to come to light

so that Osborne can actually file his actual innocence claim and support it with hard evidence, the State effectively would have us fully analyze that same claim as a hypothetical by adopting the same habeas standard in the instant action. In accordance with the cases discussed above, we decline to do so.

For his part, Osborne contends that the ordinary pre-trial *Brady* materiality standard is the most appropriate standard for evaluating a prisoner's post-conviction right of access to evidence. Thus, he proposes that we require only a reasonable probability that, had the evidence been disclosed to the defense, the result of his trial would have been different. *See Kyles*, 514 U.S. at 434-35; *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

As it turns out, however, Osborne's case for disclosure is so strong on the facts that his proposed legal standard, which would give him the benefit of both the presumption of innocence and the requirement of jury unanimity for conviction, sets the bar far lower than what he is able to show in this case. Wherever the bar is, he crosses it. This case therefore does not require us to determine the full breadth of post-conviction *Brady* rights. The precise height at which the materiality bar should be set is largely an academic question, which we may leave to another day and another case that truly presses the issue. Resolving the instant case requires us to determine only that Osborne's showing of materiality is sufficient to require disclosure, and not whether the same due process right might be invoked upon a lesser showing.

In accordance with that reservation and our analysis in rejecting the State's proposal as setting the bar

too high, we hold that the standard of materiality applicable to Osborne's claim for post-conviction access to evidence is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed to Osborne, he could prevail in an action for post-conviction relief. Taking into account Osborne's declared intention to file a freestanding claim of actual innocence, materiality would be established by a reasonable probability that Osborne could "affirmatively prove that he is probably innocent." *Carriger*, 132 F.3d at 476. And to paraphrase the Supreme Court's definition of "reasonable probability," this materiality standard does not require a demonstration by a preponderance that disclosure of the DNA evidence will ultimately enable Osborne to prove his innocence. *See Kyles*, 514 U.S. at 434. The question is not whether Osborne would more likely than not be granted habeas relief with the evidence, but whether in the absence of the DNA evidence Osborne would receive a fair habeas hearing, understood as a hearing resulting in a judgment "worthy of confidence." *Id.*

As discussed next, considered in light of the particular facts of this case, this standard is satisfied by the potential probative value of the DNA evidence to which Osborne seeks access.

IV

A

As an initial matter, the State contends that in assessing the potential materiality of further DNA testing, this court should give preclusive effect to three factual findings made by the Alaska Superior Court, and later affirmed by the Alaska Court of Appeals in *State II*, when the court rejected Osborne's

request for DNA testing under state law. Those findings are that (1) Osborne's conviction did not rest primarily on eyewitness identification evidence, (2) there was no demonstrable doubt concerning the accuracy of the victim's identification of Osborne as the perpetrator, and (3) additional DNA testing would not conclusively establish Osborne's innocence. *State II*, 163 P.3d at 978.

Whether the state court's factual findings have preclusive effect in this federal proceeding is a mixed question of law and fact that we review *de novo*. *See Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir.2003). In § 1983 actions, we apply state law to determine the preclusive effect of a state court's findings. *Heck v. Humphrey*, 512 U.S. 477, 480 n. 2, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Under Alaska law, factual findings are entitled to preclusive effect if the party against whom estoppel is asserted was a party to or in privity with a party to the prior action, the issue to be precluded is identical to that decided in the first action, and the issue in the first action was resolved by a final judgment on the merits. *Holmberg v. State*, 796 P.2d 823, 827 (Alaska 1990). The parties here raise no dispute regarding the privity and final judgment requirements. They dispute only whether the issues decided by the Alaska courts are identical to the issues raised by Osborne's access-to-evidence claim under federal law.

The state court's first and second findings regarding the evidence supporting Osborne's identification as the perpetrator are certainly relevant to our inquiry, but only insofar as such evidence is part of the broader evidentiary backdrop against which the materiality of exculpatory DNA tests is to be analyzed. The state court's findings fundamentally differ

from our materiality inquiry, however, in that they are exclusively historical, focusing only on the state of the evidence as it existed at trial and whether that trial record would lead one to question the integrity of that evidence, much like a sufficiency of the evidence inquiry under *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). By contrast, the materiality of suppressed evidence and the viability of an actual innocence claim based on new evidence are far more comprehensive and forward-looking inquiries that do not "turn on discrete findings regarding disputed points of fact." *House*, 547 U.S. at 539-40. "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded [or was inherently flawed], but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence" in a decision made without the evidence. *Kyles*, 514 U.S. at 435. In assessing whether DNA results favorable to Osborne would be material to an actual innocence claim, we "must consider all the evidence, old and new, incriminating and exculpatory," and "make a probabilistic determination about what [a reasonable fact-finder] would do." *House*, 547 U.S. at 538 (internal quotation marks omitted).

Thus, only the state court's third finding-which is essentially its "materiality" finding under Alaska law-is in play here. But that finding is also not entitled to preclusive effect in this case because it was made in conformity with a materiality standard under state law that is more stringent than any standard this court would apply under federal law. Whereas the Alaska courts inquired as to whether DNA tests excluding Osborne as the source of

the genetic material would "*conclusively* establish Osborne's innocence" *State II*, 163 P.3d at 981 (emphasis added),[3] we have determined that materiality under federal law requires Osborne to demonstrate, at most, only a *reasonable probability* that with favorable DNA test results he could affirmatively prove that he is *probably* innocent. *Cf. House*, 547 U.S. at 538, 553-54 (holding that, although there was not "conclusive exoneration," the petitioner satisfied the *Schlup* standard for a gateway claim of actual innocence-"that more likely than not, in light of the new evidence, . . . any reasonable juror would have reasonable doubt"). Indeed, Alaska's materiality standard for merely obtaining post-conviction access to evidence is more stringent than even this circuit's standard for obtaining habeas relief based on a freestanding claim of actual innocence. *Compare State II*, 163 P.3d at 981 ("conclusively

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[3] The Alaska Court of Appeals originally phrased the broader issue under Alaska law as "whether further DNA testing . . . would *likely* be conclusive on the issue of Osborne's guilt or innocence." *State II*, 163 P.3d at 980 (emphasis added). But that inquiry undergoes a significant metamorphosis as the opinion progresses. After the court acknowledges that further DNA testing could produce three different results—inculpatory, inconclusive, or exculpatory-from that point forward the court presumes test results favorable to Osborne and the word "likely" disappears from its statement of the legal standard. *Id.* Thus, the inquiry ultimately becomes: "assuming that this third alternative came to pass—*i.e.*, assuming that a more discriminating DNA test showed that the genetic material did not come from Osborne—would this test result be conclusive evidence of Osborne's innocence?" *Id.* Moreover, even if we have misread or were to ignore this shift, we would reach the same result. First, it is unclear whether "likely" equates to "reasonable probability" within the meaning of *Bagley* and *Kyles*. And second, a freestanding actual innocence claim under *Carriger* requires only an affirmative showing of probable innocence, not conclusive proof.

establish Osborne's innocence"), *with Carriger*, 132 F.3d at 476 ("affirmatively prove that he is probably innocent"). We therefore afford the state court's findings no preclusive effect in determining whether the evidence in question is sufficiently material to require disclosure by the State.

B

The State contends that even DNA test results excluding Osborne as the source of the semen and pubic hair from the blue condom and the pubic hair from K.G.'s sweater would not cast sufficient doubt on his conviction to require disclosure of that evidence. In the State's view, notwithstanding the prosecution's reliance on such biological evidence in obtaining Osborne's conviction, the evidence actually might be entirely unrelated to the rape and therefore immaterial to Osborne's claim of innocence.

Regarding the semen and pubic hair from the blue condom, the State acknowledges that the condom was recovered at the crime scene, that expert testimony was presented at trial comparing Osborne's hair to the pubic hair from the condom and matching Osborne's DQ Alpha type to that of the sperm from the condom, which placed Osborne within 14.7 to 16 percent of the black population sharing that type, and that in the prosecution's closing argument it specifically relied on the combination of this genetic evidence as proof of Osborne's guilt. Nonetheless, considering the possibility that more precise DNA tests might conclusively establish that Osborne did not use the blue condom, the State now argues that such evidence was "not the sole basis for finding Osborne guilty" in that there was circumstantial evidence placing Osborne with Jackson on the night in question and K.G. identified Osborne as the

passenger-rapist. Moreover, the State argues," [o]ther conclusions about the donor of the DNA in the sperm and the hair associated with the condom were plausible and equally reconcilable with Osborne's guilt." Based on the fact that the condom was recovered by the police more than twenty-four hours after the assault and, according to the State's characterization, "in a semi-secluded area on the outskirts of Anchorage that was convenient for conducting sexual trysts," the State now proposes three possible scenarios for how Osborne could be guilty despite exculpatory DNA tests. First, the blue condom could have been discarded at the crime scene by persons unrelated to Jackson and Osborne either before K.G.'s attack or after the attack but before the police searched the area. Second, the blue condom could have been used at an earlier time by another individual, left in Jackson's car, and discarded or dropped at the crime scene by Jackson and Osborne. Or third, trace biological material—particularly the pubic hair found on the outside of the condom—could have been transferred to the condom from another surface after its use.

The State makes a similar argument regarding the pubic hair that was found on K.G.'s sweater. According to the State, the fact that K.G. was working as a prostitute, the propensity hairs have for transference, and the ability of K.G.'s knitted acrylic sweater to hold a hair all point to the possibility that it might be anyone's pubic hair, and not necessarily her attacker's. Thus, despite the fact that at Osborne's trial the prosecution argued that "we know that the person that did this had contact with [K.G.'s] sweater" because" [t]here's a pubic hair on it," the State now argues that it has never been established that the pubic hair was from one of the assailants and that it "could have originated from any person

who had ever been near K.G. or from any person who had ever been in Jackson's car" prior to the rape.

On their face, the State's hypotheticals are not beyond the bounds of reason. But that is not the applicable federal standard for determining the materiality of evidence that is favorable to the accused, notwithstanding the Alaska Court of Appeals' interpretation of Alaska law. *Cf. State II*, 163 P.3d at 980-81 (concluding that further DNA testing "would not conclusively establish Osborne's innocence," based in part on the reasoning that the blue condom "might have been coincidentally left in the vicinity by another person before the police arrived"). Those hypotheticals must be assessed in light of the entire record. And in that regard, although the State points to the circumstantial and eyewitness evidence that is supportive of the prosecution's case at trial and Osborne's conviction, the State fails to point to any *evidence in the record* that would affirmatively support its newly imagined alternative theories of the crime and accordingly rebut its own presentation at trial regarding the significance of the biological evidence as positively identifying the real perpetrator. *Cf. House*, 547 U.S. at 547 (noting the lack of evidence "in the present record" rebutting the new evidence supporting petitioner's actual innocence claim). The State's hypotheticals are formulated based on nothing more than the very uncertainties that necessarily arise where new evidence upsets accepted notions of reality and forces a fundamental reassessment of the factual record. Even worse, they fail to account for evidence already in the record that seriously calls into question whether the State's hypotheticals might have any basis in reality. *Cf. id.* at 546 ("This should be a matter for the trier of fact to

consider in the first instance, but we can note a line of argument that could refute the State's position.").

The trial record reveals that the attack occurred down a service road, which was located in an isolated area on the outskirts of Anchorage off Point Woronzof Drive and near Earthquake Park. Although the State characterizes it as a "semi-secluded" location that was "convenient for conducting sexual trysts," which is apparently why the perpetrators chose the location, there does not appear to be any evidence in the record indicating that the location was ever used for such a purpose by any other persons on that night or the following day, or for that matter any other day. To the contrary, the evidence presented at trial seems to indicate that no one else had been down that service road, either by car or on foot, around the time of the crime. There was already snow on the ground before the attack, and a layer of new snow fell by the next morning. Judging by the tracks in the snow, only a few known individuals visited the area at the end of the service road both on the night of the assault and the next day. Even though the police did not arrive until twenty-four hours after the attack, they found only a few sets of footprints and tire tracks. The police made castings of some of the show prints in the snow, but those were matched to K.G.'s rescuers and their neighbor and were therefore eliminated as suspect prints. Similarly, the trial record indicates the police found only three sets of tire tracks, all of which were later matched to known vehicles-those owned by Jackson, K.G.'s rescuers, and their neighbor. Because of the old and new snow layers, the police were even able to distinguish each of the three sets of tracks by the time periods in which they were made. The tracks from Jackson's car were in a lower layer of snow, while the two other

sets were fresh. This was due to the fact that K.G. had walked to the main road before being picked up, and her rescuers and their neighbor did not visit the crime scene until the following day after the new snow had fallen. Significantly, the trial record does not indicate the existence of any other tire tracks or shoe prints that might have indicated that some unknown, innocent person visited the scene either before or after the attack.

Additional record evidence also tends to contradict the notion that the blue condom could be attributable to someone other than Jackson's accomplice. The trial record indicates that the police recovered no condoms from Jackson's car, they recovered only one condom and part of a blue foil condom wrapper from the crime scene, and the color and size of the blue condom and the color of the wrapper were the same as that of the condom and wrapper that K.G. had with her that night. K.G. also testified that she thought the condom was the same one that she had with her and that Jackson's passenger wore during the rape. The police found the condom "at point C in the snow" right beside some blood and part of the blue and gold foil wrapper matching the condom K.G. was carrying, and it was also very near the spent shell casing from Jackson's gun, K.G.'s bloody pants, the disturbed berm of snow in which K.G. had been partially buried, and the tire tracks from Jackson's car, probably on the passenger side where Jackson's accomplice would have been. Thus, the condom was found not merely in the vicinity of the crime scene but in the *exact* location where K.G. was attacked. Regarding the timing, although the police did not search the crime scene until twenty-four hours after the rape, K.G.'s rescuers reported seeing the condom lying in the snow when they visited the crime scene

around noon on the day after the attack. Thus, the time frame in which the condom could have been left there was far narrower than the State suggests. Finally, a crime lab technician testified that when he received the condom, which by then had been packaged in a closed plastic cup, the condom was rolled down and there was still a substantial amount of semen inside that had not yet dried. Taken together, these facts are far more consistent with the prosecution's trial narrative—that Jackson's passenger used K.G.'s condom during the rape, he removed and discarded it at the scene, and it remained undisturbed in the snow until it was recovered by the police—than any of the State's newly proposed alternative explanations for the condom's origin.

The State also fails to recognize that further DNA testing is *alone* capable of establishing the supposedly missing link between the condom and K.G.'s rape. The potential probative value of the semen and pubic hair from the blue condom and the pubic hair from K.G.'s sweater must be considered collectively, not in isolation as the State has considered the evidence. *See Kyles*, 514 U.S. at 436 (explaining that materiality is defined "in terms of suppressed evidence considered collectively, not item by item"); *House*, 547 U.S. at 538 ("*Schlup* makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory" (internal quotation marks omitted)); *see, e.g., id.* at 552-53 ("If considered in isolation, a reasonable jury might well disregard it. In combination, however, . . . the evidence . . . likely would reinforce other doubts as to House's guilt."). As the State itself should expect given the prosecutor's trial presentation and its continued belief in Osborne's guilt, further DNA testing could establish a genetic match between the

semen and pubic hair on the condom and the pubic hair on K.G.'s sweater, proving that the user of the condom was also in such contact with K.G. as to transfer a pubic hair to her sweater. As the prosecutor argued at trial, because the sweater was spread out underneath K.G. during the rape, the most likely scenario is that the hair was transferred by Jackson's accomplice at that time.

Moreover, further DNA testing might even directly link the blue condom to K.G. herself. Although we have mainly focused on the semen and hair evidence that we know to exist, the trial record reveals that epithelial cells were found on the outside of the condom. Based on this evidence, the prosecution argued at trial that it indicates how the condom was used because epithelial cells come from only the inside of the mouth, rectum or vagina. Further DNA testing might be able to go one step further and genetically match any such trace material from the condom to K.G., conclusively establishing that the condom was used in K.G.'s rape and disproving any of the State's new hypotheses.

New evidence favorable to Osborne could also lead to new lines of investigation and additional new evidence. *See People v. Garcia*, 17 Cal.App.4th 1169, 22 Cal.Rptr.2d 545, 551 (Cal.Ct.App.1993); *see also Bagley*, 473 U.S. at 683 ("[T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case."). Based on the State's obstinate denial that Osborne might be innocent even if DNA test results exclude him as a source of the biological evidence used to convict him, the State would seem intent on developing a case to continue to fight Osborne's claim of

innocence. But such an investigation might instead lead in the opposite direction and further solidify Osborne's case for innocence. As Osborne contends, if the STR DNA test results exclude him, those results could then be placed into the state and national DNA databank system, which did not exist when Osborne was tried, and possibly identify the real perpetrator. *See State I*, 110 P.3d at 992 n. 14 (noting that Alaska maintains a DNA registry).

In summary, the State's proposed hypotheticals for reconciling exculpatory DNA tests with Osborne's guilt are so inconsistent with and improbable in light of the evidence in the trial record that they cannot negate the materiality of further DNA testing to possible post-conviction relief. *Cf. House*, 547 U.S. at 553-54 (holding that, although there was not "conclusive exoneration," the petitioner satisfied the *Schlup* actual innocence standard). "In light of the obvious exculpatory potential of semen evidence in a sexual assault case," *Thomas*, 979 F.2d at 750 n. 2, and given the evidentiary record in this sexual assault case and the unique circumstances of this crime, we have no difficulty concluding that DNA tests favorable to Osborne would have extraordinary exculpatory potential and would be material to proving his actual innocence. At the very least, exculpatory DNA tests would entitle Osborne to an evidentiary hearing on his actual innocence claim in order to more fully develop the factual record and reconcile any conflicting evidence. *See Cooper v. Woodford*, 358 F.3d 1117, 1123-24 (9th Cir.2004) (en banc); *cf. House*, 547 U.S. at 537 (addressing the merits of a *Schlup* gateway claim "based on a fully developed record").

C

Thus far we have limited our analysis to the evidence in the trial record and the evidence that might be discovered if the State were forced to allow it to come to light. But the State also points to Osborne's written confession in his application for parole and his oral confession at his subsequent parole hearing as foreclosing his right to obtain post-conviction access.

The confessions are certainly relevant to our inquiry. Because Osborne's ultimate claim for post-conviction relief will be actual innocence rather than mere trial error, all new evidence may be considered in assessing the potential materiality of further DNA testing. *See House*, 547 U.S. at 538 ("all the evidence, old and new, incriminating and exculpatory, without regard to . . . admissibility . . . at trial" (internal quotation marks omitted)). No doubt, that includes Osborne's written and oral confessions to the state parole board. *See State II*, 163 P.3d at 978-79.

We disagree, however, that the confessions foreclose Osborne's right to obtain post-conviction access to evidence. The same rule that allows us to consider the probative value of the confessions requires that we do so in light of exculpatory DNA tests and all the rest of the new and old evidence in this case. Thus, the question before us is not how much weight we should afford Osborne's confessions standing alone, but how they might be squared with exculpatory DNA tests and the remainder of the evidentiary record. *See Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F.Supp.2d 366, 370 (E.D.Pa. 2001) ("While plaintiff's detailed confessions to the rapes are powerful inculpatory evidence, so to any DNA testing that would exclude plaintiff as the

source of the genetic material taken from the victims would be powerful exculpatory evidence."). As we have already discussed, further DNA testing will be highly probative of Osborne's guilt or innocence given the facts as we know them. We can therefore expect to see one of two possible scenarios unfold: Either the confessions will be proven accurate by test results proving Osborne was in fact the passenger-rapist and his case will proceed no further, or the test results will exclude him as the source of the biological material, in which case serious questions will be raised about the validity of his confessions and whether, as Osborne now claims, he was motivated to confess falsely as the most expeditious means available to obtain release from prison. *Cf. Baylor v. Estelle*, 94 F.3d 1321, 1323-25 (9th Cir.1996) (holding that despite the defendant's confession, trial counsel's ineffective assistance in failing to follow up on potentially exculpatory semen evidence in a sexual assault case was prejudicial because evidence excluding the defendant as the semen donor "would necessarily have raised reasonable doubt about the validity of his confession").

Accordingly, we decline to hold that Osborne's confession during parole proceedings necessarily trumps the materiality of physical evidence or the right to obtain post-conviction access to evidence. Such a rule would ignore the emerging reality of wrongful convictions based on false confessions and the capability of DNA testing to reveal the objective truth and exonerate the innocent.

D

The State finally contends that the district court erred in finding that further DNA testing "can be easily performed without cost or prejudice to the

[State]." *Osborne*, 445 F.Supp.2d at 1081. In the State's view, prejudice is inherent in the granting of post-conviction access to evidence because it erodes the important value of finality in the criminal justice system. We disagree.

Although finality is undoubtedly an important consideration, it is not such an immovable force as to override the due process interests presently at stake. If Osborne already had in hand the exculpatory evidence he seeks and filed a habeas petition stating a valid claim for relief, there would be no question that his petition must be heard despite finality considerations. "The federal writ of habeas corpus overrides all [such] considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." *McCleskey v. Zant*, 499 U.S. 467, 492-93, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Even a procedural default would not necessarily foreclose Osborne's claim given the availability of a *Schlup* gateway claim of actual innocence. *See, e.g., Thomas*, 979 F.2d at 749. Though no doubt eroding finality, such an exception "serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty,' guaranteeing that the ends of justice will be served in full." *McCleskey*, 499 U.S. at 495 (quoting *Stone v. Powell*, 428 U.S. 465, 491-92 n. 31, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)).

The State's conception of finality would reverse these priorities. The evidence in question can be produced easily and without cost to the State and, if favorable to Osborne, would be strong evidence in support of post-conviction relief. Nonetheless, the State seeks to foreclose such relief by its simple re-

fusal to open the evidence locker. We rejected a similar tactic in *Thomas*, 979 F.2d at 749-50, and we reject it again here.

The State supports its position with the argument that the circumstantial and eyewitness evidence in this case is also strong evidence of Osborne's guilt, and thus granting access is not likely to "further the truth seeking function of our criminal justice system." As recent history has shown, however, DNA evidence has the capability of refuting otherwise irrefutable inculpatory evidence, and as we have already established this case is no exception.

If the inculpatory evidence has been correctly interpreted, further DNA testing will confirm that Osborne is guilty as charged and convicted. But it remains a very real possibility that further DNA testing will be exculpatory and may even lead to Osborne's exoneration. In the former case, the State will have lost nothing; indeed, it will gain even more definitive proof of Osborne's guilt and will be relieved of the burden of further post-conviction litigation. In the latter case, however, Osborne will obviously gain a great deal, as will the State, whose paramount interests are in seeking justice, not obtaining convictions at all costs, and which will then have strong evidence for use in catching and punishing the real perpetrator. Importantly, the State is prejudiced in neither case, and the truth-seeking function of the criminal justice system is furthered in either case.

V

In *Thomas*, we granted a prisoner's request for post-conviction DNA testing to establish a gateway claim of actual innocence "[i]n light of the obvious exculpatory potential of semen evidence in a sexual

assault case." 979 F.2d at 750 n. 2. This sexual assault case is no exception. We therefore agree with the district court and hold that Osborne's right to due process of law prohibits the State from denying him reasonable access to biological evidence for the purpose of further DNA testing, where that biological evidence was used to secure his conviction, the DNA testing is to be conducted using methods that were unavailable at the time of trial and are far more precise than the methods that were then available, such methods are capable of conclusively determining whether Osborne is the source of the genetic material, the testing can be conducted without cost or prejudice to the State, and the evidence is material to available forms of post-conviction relief.[4]

In so holding, however, we do not purport to set the standards by which all future cases must be judged. We are presented with a certain set of circumstances presenting a meritorious case for disclosure, and our analysis and holding are addressed to those circumstances only. Despite the manner in which the parties have presented the issues, such questions as whether the scope of the right of post-conviction access should be broader or flexible to accommodate different circumstances, whether the materiality standard for post-conviction access-to-evidence claims should be less stringent or defined in a different

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[4] Given our holding, we need not reach Osborne's alternative arguments that the State's denial of access to potentially exculpatory DNA evidence is effectively a denial of meaningful access to courts in violation of the First and Fourteenth Amendments, *see Christopher v. Harbury*, 536 U.S. 403, 412-22, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002), or that it violates his due process right to effectively pursue parole and executive clemency, *see Harvey II*, 285 F.3d at 320 (Luttig, J., respecting the denial of rehearing en banc).

manner, and whether prisoners with a less compelling case might also be entitled to post-conviction access, all are questions that we need not answer and do not purport to answer in deciding this case. We leave them for another day.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 3:03-cv-0118-RRB

WILLIAM G. OSBORNE,
Plaintiff,

vs.

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ANCHORAGE, ALASKA; SUSAN A. PARKES, DISTRICT ATTORNEY, in her official capacity; ANCHORAGE POLICE DEPARTMENT, ANCHORAGE, ALASKA; WALT MONEGAN, ANCHORAGE POLICE DEPARTMENT.
Defendants.

August 3, 2006

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

BEISTLINE, *District Judge.*

I. INTRODUCTION

Before the Court are Cross-Motions for Summary Judgment (Docket Nos. 76 & 107), which present the issue of whether Defendants have a federal constitutional right to subject potentially exculpatory evidence to post-conviction deoxyribonucleic acid (DNA) testing. The issue was well-briefed by both parties, and presents a very close question of first impres-

sion.[1] The issue arises primarily because of significant scientific advances, in recent years, in the field of DNA testing, to include the Short Term Repeat (STR) method of DNA testing.[2]

II. FACTS

Plaintiff William G. Osborne ("Plaintiff") "was convicted by an Alaskan jury of two counts of first-degree sexual assault, one count of kidnapping [sic], and one count of first-degree assault."[3] Post-conviction, and concurrent with ongoing state court proceedings, Plaintiff filed the present action, wherein "he seeks an injunction requiring [Defendants] to provide him with access to certain items of evidence so that he can subject it to post-conviction DNA testing."[4] More specifically, Plaintiff "intends to subject these items of evidence to [STR] DNA testing and

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[1] "We express no opinion as to whether (Plaintiff) has been deprived of a federally protected right, and leave that question to the district court to address *in the first instance*." *Osborne v. District Attorney's Office for Third Judicial Dist.*, 423 F.3d 1050, 1054 (9th Cir. 2005)(emphasis added).

[2] "The current standard for forensic DNA testing is the Short Term Repeat (STR) test. This test includes elements of the Polymerase Chain Reaction (PCR) method, which allows for very small and degraded samples to be tested successfully." Benjamin N. Cardozo School of Law, Yeshiva University, What is DNA?, http://www.innocenceproject.org/docs/IPDNA_WEB.pdf.

Although not conclusive, recent developments in DNA testing have also been addressed by the United States Supreme Court. *See House v. Bell*, 126 S. Ct. 2064, 2086 (2006)("the central forensic proof connecting House to the crime—the blood and the semen—has been called into question, and House has put forward substantial evidence pointing to a different suspect.").

[3] Clerk's Docket No. 108 at 1.

[4] *Id.* at 1-2.

possibly mitochondrial DNA testing, methods of DNA testing that were developed after his trial."[5]

In conjunction with *Osborne v. District Attorney's Office for Third Judicial Dist.*, 423 F.3d 1050, 1056 (9th Cir. 2005), the only issue before the Court is whether Plaintiff has a federally protected right, i.e., a right to *seek* "post-conviction access to biological evidence in the government's possession."[6] The Alaska State Courts have already found against Plaintiff with respect to the same, *see Osborne v. State*, 110 P.3d 986, 995 (Alaska App. 2005)(holding that Plaintiff "has no due process right under the federal constitution to present new evidence to establish his factual innocence."). That decision, however, is not binding upon this Court.

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.[7] The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[8] Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[9] All evidence

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[5] *Id.* at 2.

[6] *Osborne*, 423 F.3d at 1056.

[7] *Celotex Corp. v. Catrett*, 477 U.S 317, 323 (1986).

[8] *Id.* at 323-325.

[9] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-9 (1986).

presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.[10] However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[11]

IV. DISCUSSION

Having considered the relevant pleadings, as well as the applicable case law, the Court concludes that there *does* exist, *under the unique and specific facts presented*, a very limited constitutional right to the testing sought.[12] Significant to this conclusion is the fact that the testing sought was not available to Plaintiff William G. Osborne ("Plaintiff") at the time of trial, the fact that the testing sought can be easily performed without cost or prejudice to the Govern-

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[10] *Id.* at 255.

[11] *Id.* at 248-9.

[12] *See Harvey v. Horan*, 285 F.3d 298, 325 (4th Cir. 2002) (Luttig, J., concurring in denial of rehearing en Banc on mootness grounds)("(T]here is a limited, constitutional post-conviction right of access to previously-produced forensic evidence for the purpose of STR and related DNA testing."). Although not authoritative, the Court finds Judge Luttig's opinion to be particularly persuasive on this issue. Also persuasive on this *issue* are: (1) *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992)(wherein the Ninth Circuit found that the state has a post-conviction *Brady* obligation to produce DNA evidence in the habeas context); and (2) *Moore v. Lockyer*, 2005 WL 2334350 at *8 & *9 (N.D. Cal. 2005)(holding that: (1) "to permit the state to deny a convicted defendant access to evidence that could prove his or her innocence for no reason whatsoever" would violate due process; and (2) the due process right to obtain access to DNA evidence should be "limited").

ment, and the fact that the test results can either confirm Plaintiff's guilt or provide evidence upon which Plaintiff might seek a new trial. In this regard, and although the Court makes no findings as to whether Plaintiff would be entitled to a new trial, the Court concludes that a favorable result for Plaintiff might have a significant impact on a fact-finders evaluation of guilt or innocence.

The Court also concludes that equity and fundamental notions of fairness argue in favor of the relief Plaintiff seeks; especially, when considered in the appropriate context, e.g., the Government has no legitimate interest in punishing the innocent.[13]

The Court's conclusion in this matter assumes the availability of the evidence sought. If the evidence were no longer available, for any legitimate reason, there exists no right to test it and no basis upon which Plaintiff could pursue the issue further.

V. CONCLUSION

Based upon the aforesaid, Plaintiff's Motion for Summary Judgment (Docket No. 76) is hereby GRANTED and Defendants' Cross-Motion for Summary Judgment (Docket No. 107) is hereby DENIED.

ENTERED this 3rd day of August, 2006.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
United States District Judge

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[13] "The vigilant search for truth is the hallmark of our criminal justice system. Our methods of investigation, rules of criminal procedure, and appellate process are designed to ensure that the guilty are apprehended and convicted while the innocent are protected." *See* National Institute for Justice, *Postconviction DNA testing: Recommendations for Handling Requests* (1999).

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 04-35126

WILLIAM G. OSBORNE,
Plaintiff-Appellant,

v.

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT; SUSAN A. PARKES; ANCHORAGE POLICE DEPARTMENT; WALT MONEGAN,
Defendants-Appellees.

Argued and Submitted July 14, 2005
Filed Sept. 8, 2005

Before: GOODWIN, BRUNETTI, and W. FLETCHER, *Circuit Judges*.

BRUNETTI, *Circuit Judge*:

William Osborne, an Alaska prisoner, appeals the district court's dismissal of his action, brought under 42 U.S.C. § 1983, to compel the State to release certain biological evidence that was used to convict him in 1994 of kidnapping and sexual assault. Osborne, who maintains his factual innocence, hopes to subject the evidence, at his expense, to more sophisticated DNA analysis than was available at the time of his trial. He alleges that by refusing him post-conviction access to the evidence, the State has violated his constitu-

tional rights under the First, Sixth, Eighth, and Fourteenth Amendments.

Without reaching the question of whether there exists a constitutional right of post-conviction access to DNA evidence, the district court dismissed Osborne's action for failure to state a claim. It ruled that because Osborne seeks to "set the stage" for an attack on his underlying conviction, his § 1983 action is barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and thus a petition for habeas corpus is his sole remedy. On appeal, Osborne argues that the district court applied a more restrictive standard than that enunciated in *Heck*, and submits that success on the merits of his § 1983 claim would not "necessarily imply" the invalidity of his state court conviction. We agree, and accordingly reverse the judgment of the district court and remand for further proceedings.

BACKGROUND

Following a March 1994 jury trial in Alaska Superior Court, Osborne was convicted of kidnapping, assault, and sexual assault, and was sentenced to 26 years' imprisonment. The charges arose from a March 1993 incident in which the victim, a prostitute named K.G., after agreeing to perform fellatio on two clients, was driven to a secluded area of Anchorage, raped at gunpoint, beaten with an axe handle, and shot and left for dead.

K.G. later identified, from photo lineups, Osborne and Dexter Jackson as her assailants. At their joint trial, abundant physical evidence linked Jackson to the crime scene. Specifically, K.G. identified Jackson's car as the one in which the assault took place, and tire tracks at the scene matched those made by

Jackson's car. K.G. also identified a pocketknife found in Jackson's car as hers, and ballistics tied a spent shell casing found at the crime scene to a pistol found in Jackson's car. By contrast, aside from K.G.'s (and Jackson's) identification of Osborne as the second assailant, the State tied Osborne to the assault based primarily on its analysis of biological evidence recovered from the crime scene—namely, a used condom, two hairs, and certain bloodied and semen-stained clothing.

The State subjected the sperm found in the used condom to "DQ Alpha" testing, an early form of DNA testing that, like ABO blood typing, reveals the alleles present at a single genetic locus. The results showed that the sperm had the same DQ Alpha type as Osborne; however, this DQ Alpha type is shared by 14.7 to 16 percent of African Americans, and can thus be expected in one of every 6 or 7 black men. The State also recovered two hairs from the crime scene: one from the used condom, and another from K.G.'s sweatshirt. DQ Alpha typing of these hairs was unsuccessful, likely because the samples were too small for analysis. Both, however, were "negroid" pubic hairs with the "same microscopic features" as Osborne's pubic hair. Tests performed on K.G.'s clothing were inconclusive.

This evidence was submitted to the jury, which rejected Osborne's defense of mistaken identity and convicted him of kidnapping, first-degree assault, and two counts of first-degree sexual assault. His convictions were affirmed on direct appeal. *Jackson v. State*, No. A-5276, at 6 (Alaska Ct.App.1996) (unpublished decision). With his application for state post-conviction relief still pending in the Alaska courts, *Osborne v. State*, 110 P.3d 986 (Alaska Ct.App.2005),

Osborne filed the instant § 1983 claim. His complaint alleges that the District Attorney's Office, District Attorney Susan Parkes, the Anchorage Police Department, and Police Chief Walt Monegan (collectively, the "State") violated his federal constitutional rights by denying him access to this evidence. As relief, he seeks only "the release of the biological evidence" and "the transfer of such evidence for DNA testing."

Osborne intends to subject the evidence, at his expense, to two forms of DNA testing: Short Tandem Repeat ("STR") analysis and Mitochondrial DNA ("mtDNA") analysis. Unlike the DQ Alpha analysis presented at trial, which looks to only one genetic locus, STR analysis examines the alleles at 13 genetic loci. It thus has the power to produce a far more specific genetic profile—one shared by one in a billion people, rather than one in 6 or 7. Moreover, if the hairs prove unsuitable for STR analysis, Osborne intends to submit them to mtDNA analysis, which, unlike STR analysis, is capable of reaching a result on hair samples without intact roots or follicles. Osborne asserts that neither STR nor mtDNA analysis was available at the time of his trial.

The magistrate judge recommended dismissing Osborne's § 1983 action, finding that because he seeks to "set the stage" for an attack on his underlying conviction, under *Heck* a petition for habeas corpus is his sole remedy. The district court accepted and adopted this recommendation, and dismissed the action.

STANDARD OF REVIEW

We review *de novo* a dismissal for failure to state a claim pursuant to Rule 12(b)(6), *Decker v. Advantage Fund Ltd.*, 362 F.3d 593, 595-96 (9th Cir.2004), and will not affirm unless it appears beyond doubt that

the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.*, 320 F.3d 920, 931 (9th Cir.2003).

DISCUSSION

This case requires us to consider, once again, " 'the extent to which § 1983 is a permissible alternative to the traditional remedy of habeas corpus.' " *Docken v. Chase*, 393 F.3d 1024, 1027 (9th Cir.2004) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)). As the Supreme Court has recognized, state prisoners have two potential avenues to remedy violations of their federal constitutional rights: a habeas petition under 28 U.S.C. § 2254, and a civil suit under 42 U.S.C. § 1983. *Heck*, 512 U.S. at 480, 114 S.Ct. 2364. Of course, while a habeas petition may ultimately secure release, habeas relief is often barred by procedural hurdles. By contrast, a § 1983 suit will not result in release, but is generally not barred by a failure to exhaust state remedies. *Id.* at 480-81, 114 S.Ct. 2364.

A. Preiser, Heck, and their Progeny

The Court, like this circuit, has attempted to "harmoniz[e] the broad language of § 1983, a general statute, with the specific federal habeas corpus statute." *Id.* at 491, 114 S.Ct. 2364 (Thomas, J., concurring) (internal quotation marks omitted); *Docken*, 393 F.3d at 1030-31 & n. 6 (surveying "the line between § 1983 and habeas" and concluding that "the remedies are not always mutually exclusive"). These efforts began in *Preiser*, where the Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to

immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Preiser*, 411 U.S. at 500, 93 S.Ct. 1827. They continued in *Heck*, where the Court enunciated what has become known as the "favorable termination" requirement: Where a prisoner's § 1983 action, if successful, "would necessarily imply the invalidity" of his conviction or sentence, it must be dismissed "unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 487, 114 S.Ct. 2364; *see also Docken*, 393 F.3d at 1027-28. And they were refined, in the wake of *Heck*, in cases most commonly involving prisoner challenges to state disciplinary and parole procedures. *See Docken*, 393 F.3d at 1028 (chronicling cases).

Most recently, the Court in *Wilkinson v. Dotson*, ___ U.S. ___, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), reviewed *Preiser*, *Heck*, and their progeny, and explained that:

> These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Id. at 1248. *Dotson* thus erases any doubt that *Heck* applies both to actions for money damages and to those, like this one, for injunctive relief, and clarifies that *Heck* provides the relevant test to determine whether § 1983 is a permissible avenue of relief for Osborne.

B. Osborne's Claim

Although the district court recognized that Osborne raises "a direct challenge to [neither] the fact nor duration of imprisonment," it ruled that his claim was *Heck*-barred because he seeks to "set the stage" to attack his underlying conviction. Though this circuit has not yet applied *Heck* in the context of a § 1983 action seeking post-conviction access to DNA evidence, the district court was not without guidance in assessing Osborne's claim. As it observed, three circuits—the Fourth, Fifth, and Eleventh—have previously confronted the very question we now face. These opinions provide valuable guidance to us as well.

The State argues that Osborne seeks to use § 1983 as a discovery device for a later habeas petition, and that allowing him to do so would circumvent habeas procedural requirements and undermine the principles of comity and federalism that *Heck* protects. It suggests that Osborne reads *Heck's* "necessarily implies" language too narrowly, and that it is enough if—as the district court was persuaded—the § 1983 action seeks to "facilitate" or "set the stage" for an attack on a conviction in a later proceeding. Put simply, the State contends that if a claim *can* be brought in habeas, it *must* be brought in habeas. Accordingly, it urges us to adopt the reasoning of the Fourth Circuit in *Harvey v. Horan* (*Harvey I*), 278 F.3d 370, 375-79 (4th Cir.2002), in which a split panel held, for much the same reasons, that § 1983 actions by prisoners seeking post-conviction access to biological evidence are barred by *Heck*. *See id.* at 378 ("[W]e must examine whether a state prisoner's claim falls within the federal habeas corpus statute. If it does, the claim cannot proceed under § 1983."); *see*

also Kutzner v. Montgomery County, 303 F.3d 339, 340 (5th Cir.2002) (adopting *Harvey I*).

Osborne argues, by contrast, that the appropriate question under *Heck* is not whether he seeks to "set the stage" to attack his underlying conviction, but rather whether success on his § 1983 claim "necessarily implies" the invalidity of his conviction. This question must be answered in the negative, he submits, because success on his § 1983 claim guarantees only access to the DNA evidence. Though he concedes that he ultimately hopes to establish his innocence, he points out that additional DNA testing may inculpate him, exculpate him, or be inconclusive. And, even if the testing exonerates him, release would come through an entirely different proceeding, either habeas or clemency. Osborne thus suggests we adopt the reasoning of the Eleventh Circuit in *Bradley v. Pryor*, 305 F.3d 1287, 1288 (11th Cir.2002), *cert. denied*, 538 U.S. 999, 123 S.Ct. 1909, 155 L.Ed.2d 826 (2003), which held, for these reasons, that a § 1983 action seeking post-conviction access to DNA evidence is not *Heck*-barred. *See also Harvey I*, 278 F.3d at 382 (King, J., concurring in part) ("That act alone—providing Harvey with access to the biological evidence relating to his rape conviction—does not . . . 'necessarily imply' the invalidity of Harvey's conviction or sentence."); *Harvey v. Horan* (*Harvey II*), 285 F.3d 298, 308-09 (4th Cir.2002) (Luttig, J., respecting the denial of rehearing en banc) (criticizing the *Harvey I* majority's application of *Heck*).

We agree with Osborne, and join the Eleventh Circuit in holding that *Heck* does not bar a prisoner's § 1983 action seeking post-conviction access to biological evidence in the government's possession. It is clear to us, as a matter of logic, that success in such

an action would not "necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 125 S.Ct. at 1248. First, success would yield only *access* to the evidence—nothing more. *See Bradley*, 305 F.3d at 1290 ("[A prisoner] prevails in this lawsuit once he has access to that evidence or an accounting for its absence."). Second, further DNA analysis may prove exculpatory, inculpatory, or inconclusive; thus, there is a significant chance that the results will either confirm or have no effect on the validity of Osborne's confinement. *See Harvey II* at 308 ("That these scientific possibilities exist, in and of itself, suffices to establish that the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence."). And third, even if the results exonerate Osborne, a separate action—alleging a separate constitutional violation altogether—would be required to overturn his conviction. *See id.; Bradley*, 305 F.3d at 1290.

C. *Dotson*

Any remaining doubt as to the propriety of this approach is removed, we believe, by the Court's recent opinion in *Dotson*, which reads "necessarily" to mean "inevitably" and rejects the notion that a claim which *can* be brought in habeas *must* be brought in habeas. 125 S.Ct. at 1246-48. In *Dotson*, the Court considered the § 1983 claims of two Ohio prisoners who alleged *ex post facto* and due process violations at their parole hearings, and who sought injunctive relief in the form of new, constitutionally proper parole hearings. *Id.* at 1245. Ohio argued that these claims were *Heck*-barred because the prisoners "believe that victory on their claims will lead to speedier release from prison," and thus the suits, "in effect, collater-

ally attack the *duration* of their confinement." *Id.* at 1245-46. The Court rejected this argument, saying:

> The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief).

Id. at 1246. This confirms our prior understanding, articulated in *Docken*, 393 F.3d at 1030-31 & n. 6, that § 1983 and habeas are not always mutually exclusive. It also fatally undermines the State's insistence that a claim which *can* be brought in habeas *must* be brought in habeas—a position embraced in *Dotson* only by Justice Kennedy, the sole dissenter. 125 S.Ct. at 1252 (Kennedy, J., dissenting).

The Court in *Dotson* also observed that *Preiser's* implied exception to § 1983 coverage exists "where the claim seeks—not where it simply 'relates to'—'core' habeas corpus relief, *i.e.*, where a state prisoner requests present or future release." *Id.* at 1247. And, it repeatedly emphasized that to be barred under *Heck*, a § 1983 claim must, if successful, *necessarily* demonstrate the invalidity of confinement or its duration. *Id.* at 1247-48; *see id.* at 1248 (citing counsel's concession below that the claims would not "inevitably" lead to release). These statements undercut considerably the State's argument that Osborne's claim is *Heck*-barred even if he seeks only to "facilitate" or "set the stage" for a future attack on his conviction.

Moreover, in response to Ohio's argument that allowing Dotson to sue under § 1983 would contravene principles of comity and federalism, the Court said: Our earlier cases . . . have already placed the

States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement. Thus, we see no reason for moving the line these cases draw. . . .

Id. at 1249 (citation omitted). This critically weakens the State's comity argument.

Ultimately, the *Dotson* court found it key that neither prisoner sought an injunction ordering "immediate or speedier release"; at most, success meant a new parole hearing, at which the prisoners might—or might not—receive reduced sentences. *Id.* at 1248. Thus, the Court concluded that "a favorable judgment will not necessarily imply the invalidity of their convictions or sentences." *Id.* (citing *Heck,* 512 U.S. at 487, 114 S.Ct. 2364) (alterations and internal quotation marks omitted). This reasoning applies with equal force and dictates the outcome here.

We acknowledge that the Fourth Circuit, in *Harvey I*, raised weighty concerns about comity, finality, and the proper role of the courts in fashioning the contours of "new" constitutional rights. 278 F.3d at 374-77. In vindicating these concerns, however, the *Harvey I* majority, in our view, strayed from the "necessarily implies" language adopted in *Heck.* Thus, for the reasons first explained by Judges King and Luttig in *Harvey I* and *II*, and later embraced by the Eleventh Circuit in *Bradley*, we hold that *Heck* does not bar a prisoner's § 1983 action seeking post-conviction access to biological evidence in the government's possession.

CONCLUSION

For the above reasons, Osborne's § 1983 action "should be allowed to proceed, in the absence of some other bar to the suit." *Heck*, 512 U.S. at 487, 114 S.Ct. 2364 (footnotes omitted). Accordingly, we reverse the judgment of the district court and remand for further proceedings. We express no opinion as to whether Osborne has been deprived of a federally protected right, and leave that question to the district court to address in the first instance.

REVERSED and REMANDED.

APPENDIX D

COURT OF APPEALS OF ALASKA

No. A-8399

WILLIAM G. OSBORNE,
Appellant,

v.

STATE OF ALASKA,
Appellee.

July 6, 2007

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges

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OPINION

COATS, *Chief Judge.*

More than a decade ago, William G. Osborne and his friend, Dexter Jackson, were convicted of kidnapping, first-degree assault, and first-degree sexual assault stemming from an attack on an Anchorage prostitute. This Court affirmed both men's convictions on direct appeal.[1]

The current appellate litigation arises from Osborne's post-conviction request for further DNA testing of certain physical evidence in his case.

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[1] *Jackson v. State*, Alaska App. Memorandum Opinion and Judgment No. 3330 (Feb. 7, 1996), 1996 WL 33686444 (Osborne was the co-appellant in this case.).

In our previous decision in this matter, *Osborne v. State*,[2] we declined to decide whether defendants in Alaska have a due process right to demand post-conviction DNA testing of physical evidence. However, we declared that, at a minimum, a defendant would have to establish three things before claiming entitlement to post-conviction DNA testing: (1) that the defendant's conviction rested primarily on eyewitness identification; (2) that there was a demonstrable doubt concerning this identification; and (3) that scientific testing of physical evidence would likely be conclusive on the issue of whether the defendant was the perpetrator[3] of the crime.

Having established this three-part test, we remanded Osborne's case to the superior court so that the parties could litigate whether, under the facts of Osborne's case, this test was satisfied.[4] After considering this matter, Superior Court Judge Sharon L. Gleason concluded that Osborne had failed to establish any of the three factors that we set forth in *Osborne*. Accordingly, she entered an order denying Osborne's further request for DNA testing.

Osborne now appeals that decision. For the reasons explained here, we affirm Judge Gleason's ruling.

The underlying facts of Osborne's criminal case

In order to explain why we agree with Judge Gleason's ruling, we must recount the evidence presented at Osborne's trial in the underlying criminal case. The following account is taken from our decision denying Osborne's direct appeal, with some

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[2] 110 P.3d 986 (Alaska App.2005).

[3] *Id.* at 995.

[4] *Id.*

additional details taken from Judge Gleason's written findings.

On the night of March 22, 1993, Osborne and Jackson invited K.G. into Jackson's car, promising her that they would pay $100 for oral sex. The two men took K.G. to a secluded spot at the western end of Northern Lights Boulevard. During the ride along Northern Lights Boulevard, Osborne and Jackson asked K.G. if she was armed. When she told them that she had a Swiss army knife, the men asked if they could look at the knife. They then took the knife from her and placed it on the car's dashboard. Jackson stopped the car at the end of Northern Lights Boulevard, and the men then asked K.G. to perform fellatio on each of them. When K.G. told Osborne and Jackson that she would not perform without first being paid, Osborne pointed a gun at her and told her, "I think you will."

Osborne and Jackson took what little money K.G. had, made K.G. strip, and then had sex with her against her will. Osborne then ordered K.G. to get out of the car and lie face-down in the snow. When K.G. refused to leave the car and began pleading for her life, Jackson hit her in the head with the gun. Osborne then began to choke her. In fear for her life, K.G. defecated on the front passenger seat of Jackson's car. Osborne scooped up some of the excrement and rubbed it in K.G.'s face, hair, and clothing. K.G. fled from the car, but the two men took a piece of wood, probably an axe handle, from the back of the car and began to strike K.G. on her head and ribs. When K.G. tried to run away, Osborne battered her knees repeatedly, yelling "Go down, bitch; go down."

Osborne and Jackson hit and kicked K.G. until she fell down. Jackson continued to hit K.G. in her pubic

area with a stick even after she had fallen. At one point, Osborne allowed K.G. to stand up, but he then hit her in the head with the axe handle.

K.G. decided to pretend that she was dead; she curled up in the snow and stopped moving. She heard a gun discharge, and she felt a bullet graze her head. (K.G. believed, based on glimpses of her assailants' feet and of Osborne's sweatsuit, that it was Osborne who shot her.) After firing this shot, Osborne and Jackson buried K.G. in the snow, apparently believing that she was either dead or dying.

Even after K.G. heard Jackson's car drive away, she continued to lie under the snow for a time, to make sure that her attackers had really left. Then she got up and started walking toward town. After walking for a short while, K.G. was able to flag down a passing automobile. K.G. told the driver and the passenger what had happened to her; she described the men who had attacked her, and the car that they were driving. K.G. asked to be taken home, because she wished to avoid the police. The driver of the car complied with her request.

At about the same time that K.G. was making her way home, witnesses saw Osborne and Jackson together. Some of these witnesses observed that there was blood on Osborne's clothing.

The next day, a neighbor of one of the occupants of the car that had taken K.G. home reported to the police what K.G. had said about this incident. When the police contacted K.G., she was initially uncooperative, but she ultimately described what had happened to her, and she turned over the clothes that she had been wearing. These clothes were soiled with feces. K.G. also underwent a physical examination, and most of her injuries were photographed.

Five days later, in the early morning of March 28, 1993, the military police on Fort Richardson stopped Jackson's car. The military police initially stopped Jackson because he had been flashing his headlights at a pickup driving in front of him. However, the police observed that Jackson's vehicle resembled composite drawings that had been circulated by the Anchorage Police Department, based on K.G.'s description of her attackers' car. When Jackson opened his glove compartment to retrieve his vehicle registration, one of the military police officers saw a gun case. This discovery led to a search of Jackson and his vehicle.

The gun case contained Jackson's .380 caliber semi-automatic pistol. And, during their search of Jackson's person, the military police found K.G.'s Swiss army knife. (This knife was uniquely marked and dented, and K.G. was able to identify it.)

The military police seized Jackson's car and turned it over to the Anchorage police, along with the items of evidence found during the searches of the car and Jackson's person. During their subsequent search of the vehicle, the Anchorage police found a bottle of perfume that K.G. had been carrying on the night of the assault. The police also detected blood in the car. When this blood was tested for DNA at the DQ alpha locus, the testing showed that the DNA in the blood sample matched K.G.'s DNA at that same site (*i.e.*, the DQ alpha locus). This DNA type occurs in less than 5% of white females. In addition, when the police tested the sweaters that K.G. had been wearing that night, they found fibers matching the carpeting in Jackson's vehicle, as well as a pubic hair that was later found to have the same characteristics as Osborne's pubic hair.

K.G. later identified both Osborne and Jackson in separate photographic lineups. She also identified Jackson's car.

When the police conducted a search of the scene of the assault on March 23rd (following their initial interview with K.G.), they discovered an area of disturbed and bloody snow, as well as two pairs of K.G.'s gray stretch pants, which were also bloody. The officers observed tire tracks at the scene—tracks which were later found to match the tires on Jackson's vehicle. In addition, the police found an expended round of .380 ammunition; forensic testing later showed that this round had been fired from Jackson's gun.

The police also discovered a used blue condom near the scene. A pubic hair taken from this blue condom had the same characteristics as Osborne's pubic hair. In addition, sperm found in the condom matched Osborne's DNA type at the DQ alpha locus—a DNA type that is shared by about one-sixth (between 14.7% and 16%) of the African-American population.

Osborne's request for additional testing of the blue condom as part of his petition for post-conviction relief

After this Court affirmed Osborne's convictions on direct appeal, Osborne filed a petition for post-conviction relief. In this petition, Osborne asserted that he had received ineffective assistance of counsel from his trial attorney, Sidney Billingslea. Osborne's primary allegation was that Billingslea acted incompetently when she decided not to seek further DNA testing of the blue condom.

As just explained, forensic testing of the sperm found in this condom revealed that the DNA strand

at the DQ alpha locus matched Osborne's DNA type at the same locus. This finding tended to link Osborne to the crime, but it was not conclusive—because approximately one-sixth of the African-American population shares this same DNA type.

The DNA testing of this sperm was conducted using a method known as "polymerase chain reaction" (PCR).[5] At the time of Osborne's trial, more discriminating methods of DNA testing were available. These methods might have excluded Osborne as the source of the sperm—or, conversely, they might have identified him more conclusively as the source of the sperm. Billingslea chose not to pursue further testing.

Responding to Osborne's allegation that this decision demonstrated incompetence, Billingslea explained that she had actively explored the possibility of having the physical evidence tested using a more discerning method. Billingslea spoke with the State's DNA expert (an employee of the State Crime Lab) and asked why the State had used the less sophisticated testing method. She reviewed various materials regarding DNA testing. And she consulted an attorney who was litigating a case involving the scientific basis of DNA testing.[6]

In the end, Billingslea decided that it was better not to seek further testing. Osborne's defense was alibi—the contention that the second man who accompanied Dexter Jackson that night was someone other than Osborne. Billingslea perceived that a more discerning DNA test was a double-edged sword: the

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[5] *Osborne*, 110 P.3d at 989-90.

[6] *Id.* at 990.

test results could either bolster Osborne's defense or undermine it. And she relied on the fact that the State's DNA evidence left substantial room for doubt—because one-sixth of the African-American population shared this same DNA type. Given these circumstances, Billingslea concluded that "Osborne was in a strategically better position without more specific DNA testing."[7]

Judge Gleason concluded that Billingslea's decision was within the range of competence expected of criminal defense attorneys, and we affirmed that ruling on appeal.[8]

However, Osborne raised an alternative argument in his petition for post-conviction relief. Osborne asserted that even if Billingslea acted competently when she chose not to seek further DNA testing of the genetic material found on the blue condom, Osborne nevertheless had the right, as a matter of due process, to pursue more discriminating DNA testing of the condom, to see if further testing might exclude him as the source of the sperm.[9]

In our prior decision, we remanded Osborne's case to the superior court for further consideration of this issue—directing the court to employ the three-part test that we described in the third paragraph of this opinion. That is, we directed the superior court to assess: (1) whether Osborne's conviction rested primarily on eyewitness identification; and, if so, (2) whether there was a demonstrable doubt concerning this identification; and, if so, (3) whether further

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[7] *Id.* (brackets omitted).

[8] *Id.* at 990-92.

[9] *Id.* at 992.

DNA testing of the genetic material on the condom would likely be conclusive on the issue of whether Osborne was the perpetrator of the crime.[10]

The proceedings and findings on remand

The remand proceedings primarily involved a re-examination of the evidence presented at Osborne's trial. However, Judge Gleason also considered the fact that Osborne had applied for discretionary parole in 2004 and that, in his application to the Parole Board, Osborne admitted, both in writing and[11] orally, his participation in the attack on K.G.

Osborne signed this statement on April 8, 2004. His signature appears underneath a printed acknowledgement that it is a class A misdemeanor under AS 11.56.210 "to submit a false written or recorded statement regarding this parole application."

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[10] *Id.* at 995-96.

[11] In Section 1 of Osborne's written application for parole (labeled "State Your Version of the Offense"), Osborne wrote: "While I was out with friends I made a call to my codefendant [*i.e.*, Dexter Jaçkson] to come pick me up from the Space Station. After he did[,] we went driving around. When we saw [K.G.] and that she was soliciting, we decided to have sex with her and then not pay her. She got in the car with us, and we all went out to Earthquake Park. Once there[,] I pulled out a gun and ordered [K.G.] to take off her clothes. After she did, me and my codefendant took turns having sex with her. After we were done[,] I ordered [K.G.] to get out of the car. She refused to do so[,] and kept refusing. I attempted to physically remove her from the car, and eventually got her out. My codefendant became enraged when he discovered that [K.G.] had defecated in his car, and [he] began to assault her with a stick. I also assaulted [K.G.] by kicking and punching her. After a few seconds[,] we both stopped, partially kicked snow on [K.G.], and then got in my codefendant ['s car and drove off[,] leaving her at the park."

At the conclusion of the remand proceedings, Judge Gleason issued written findings. She concluded that Osborne failed to satisfy any prong of the three-part test set forth in *Osborne*.

Judge Gleason found that K.G.'s identification of Osborne was supported both by the physical evidence in the case and by the other evidence placing Osborne in Dexter Jackson's company on the night of the kidnaping and rape. Thus, Judge Gleason concluded, Osborne's identification as one of K.G.'s assailants did *not* rest primarily on K.G.'s testimony and K.G.'s identification of Osborne was not subject to serious doubt.

Judge Gleason then considered the third part of the test-whether further DNA testing would likely be conclusive on the question of whether Osborne was one of the two assailants.

Judge Gleason noted that if she ordered retesting, there were three possible outcomes. The laboratory might report that it was no longer possible to test the genetic material on the condom (or, at least, no longer possible to run the more discriminating tests that Osborne proposed). Alternatively, further testing might conclusively establish that the genetic material found in the condom came from Osborne. And finally, further testing might show that there was little or no chance that the genetic material came from Osborne.

With respect to this third possibility, Judge Gleason concluded that even if the testing excluded Osborne as the source of the genetic material on the condom, this would not be conclusive evidence of his innocence. The judge noted that the condom was not found until over twenty-four hours after the assault. That is, it might have been coincidentally left in the

vicinity by other people, before the police arrived. Moreover, Judge Gleason noted that the State had presented "extensive other evidence which linked Mr. Osborne to these crimes."

Finally, Judge Gleason noted that Osborne had confessed to these crimes when he applied for discretionary parole in 2004. The judge pointed out that Osborne had signed a written statement acknowledging his participation in the kidnapping and sexual assault on K.G., and that Osborne's signature appeared underneath an explicit warning that he was required to "state the exact and complete truth" in his parole application.

Given all of this, Judge Gleason concluded that even if further DNA testing showed that Osborne could not have been the source of the genetic material, this would not conclusively establish Osborne's innocence.

Judge Gleason properly considered Osborne's confessions to the Parole Board

Before we reach the merits of Judge Gleason's findings on the three prongs of the test, we must first address Osborne's argument that Judge Gleason should not have considered his confession to the Parole Board that he participated in the kidnapping and rape of K.G.

Osborne contends that, as a matter of law, Judge Gleason could only consider the evidence that was presented at his trial, and not anything that happened or came to light afterwards. We disagree.

The essence of Osborne's claim in this litigation is that he is factually innocent of the crimes for which he has been convicted—and that he has a due process

right to a renewed examination of the physical evidence if there is a reasonable chance that this will demonstrate his factual innocence. Certainly, Osborne would argue (and we would agree) that if new evidence had been uncovered after his trial which tended to show that Osborne was factually innocent of these crimes, it would be proper for Judge Gleason and this Court to consider this new evidence when deciding whether to order further DNA testing.

For instance, if Dexter Jackson had later stated (under credible circumstances) that someone other than Osborne was his accomplice in the kidnapping and rape of K.G., that would be important evidence for a court to consider when deciding whether to grant Osborne's request for further DNA testing. Similarly, if some third person had confessed (under credible circumstances) that he, and not Osborne, was Jackson's accomplice in these crimes, this also would seem to be important evidence which Osborne would be entitled to present in support of his request for further DNA testing.

Conversely, it seems clear to us that the State should be able to avail itself of new evidence which undermines Osborne's claim of factual innocence.

Here, during Osborne's 2004 application for discretionary parole, he confessed twice (once in his written application, and again during his appearance in front of the Parole Board) that he was guilty of the crimes against K.G. These confessions are obviously relevant to Osborne's claim that the physical evidence should be retested because the testing will show that he is factually innocent. Judge Gleason could properly consider Osborne's confessions when she evaluated whether to grant Osborne's request for further DNA testing.

Osborne argues that his confessions to the Parole Board should not be believed—that he lied about his participation in these crimes so that the Parole Board would look more favorably on his request for parole. But this assertion goes to the weight of the evidence, and not to the propriety of Judge Gleason's consideration of it.

(Osborne also argues that the State improperly introduced statements made by Osborne's co-defendant, Dexter Jackson, after the trial—statements in which Jackson apparently identified Osborne as his accomplice. Osborne argues that he never had the opportunity to cross-examine Jackson about these statements. But we have examined the record on remand, and we have not found anything to suggest that Jackson's challenged statements were in fact introduced during the remand proceedings. Judge Gleason does not mention any such statements in her written findings.)

Why we uphold Judge Gleason's findings (1) that Osborne's conviction did not rest primarily on eyewitness identification, and (2) that there was no demonstrable doubt concerning the accuracy of K.G.'s identification of Osborne

Under the first two prongs of the three-part test we set forth in *Osborne,* Judge Gleason was required to assess whether Osborne's conviction rested primarily on eyewitness identification evidence, and, if so, whether there was demonstrable doubt as to the accuracy of that identification. Judge Gleason answered these questions in the negative.

Judge Gleason acknowledged that some of the State's evidence against Osborne consisted of K.G.'s eyewitness testimony. The jury heard that K.G. iden-

tified Osborne as one of the perpetrators of the crimes by picking him out of a lineup before trial, and K.G. also testified at trial that she was certain that Osborne was the passenger in Jackson's car. However, Judge Gleason noted that the State also presented substantial circumstantial evidence (including many pieces of physical evidence) tending to prove that Jackson was one of K.G.'s assailants, as well as strong evidence that Osborne was in Jackson's company at the time of these crimes.

Judge Gleason acknowledged that, compared to the State's case against Jackson, "there was less evidence to place Mr. Osborne at the scene of the crime." However, the judge listed several items of evidence that linked Osborne to the crime scene: (1) Osborne had telephoned Jackson twice from the Space Station arcade prior to the crime; (2) Osborne was observed entering Jackson's vehicle shortly before the crime occurred; (3) tickets from the Space Station were found in Jackson's car; (4) witnesses saw Osborne and Jackson together shortly after the crime occurred, and some of these witnesses observed blood on Osborne's clothing; and (5) K.G. told the driver who picked her up immediately after the assault that her attackers were "two black guys with military . . . haircuts"—a description consistent with Osborne's physical characteristics.

Judge Gleason also acknowledged that the jury heard some evidence of problems with K.G.'s identification of Osborne. In her written findings, Judge Gleason noted that

> [t]he evidence established that K.G.'s uncorrected vision was somewhere between 20/300 and 20/400, and that she was not wearing glasses on the evening of the crime. K.G. had [described]

> the passenger as [not having] any facial hair, while Mr. Osborne had a mustache. And K.G. had [described] the passenger as weighing 180 to 190 pounds and [as being] between 25 to 30 years old, while Mr. Osborne was 20 years old and weighed 155 pounds. Mr. Osborne also argues that eyewitness identifications are generally suspect, especially when a person of one race is asked to identify a person from another race.

Based on these facts, Judge Gleason concluded that if K.G.'s identification of Osborne "were to be considered in isolation, without consideration of all of the other evidence that the state presented . . . , there would be demonstrable doubt concerning Mr. Osborne's identification as the perpetrator." However, when Judge Gleason weighed K.G.'s identification of Osborne "in conjunction with all of the other evidence submitted by the State at [Osborne's] trial," the judge concluded that there was no demonstrable doubt concerning Osborne's identification as one of K.G.'s assailants.

Judge Gleason noted that, during the State's summation to the jury, the prosecutor specifically invited the jury to factor out K.G.'s identification of Osborne and to evaluate the other evidence independently. The prosecutor asked the jury to engage in "an exercise of caution [by assuming that] K.G. never came in here, . . . never testified." The prosecutor maintained that, even without K.G.'s identification testimony, "the evidence in this case warrant[ed] a conviction of Osborne."

We have independently reviewed the record of Osborne's trial, and we agree with Judge Gleason's conclusions: (1) that Osborne's conviction did not rest primarily on eyewitness identification evidence; and

(2) that, taking the evidence as a whole, there was no demonstrable doubt concerning the reliability of K.G.'s identification of Osborne.

Why we uphold Judge Gleason's finding that further DNA testing would not be conclusive on the issue of Osborne's guilt or innocence

Under the third prong of the three-part test we set forth in *Osborne*, Judge Gleason was required to assess whether further DNA testing of the physical evidence in this case would likely be conclusive on the issue of Osborne's guilt or innocence. Judge Gleason concluded that further DNA testing would not yield a conclusive answer.

As we explained above, Judge Gleason perceived that further DNA testing could yield three possible outcomes. First, the laboratory might find that it was no longer possible to test the genetic material on the condom (or, at least, no longer possible to run the more discriminating tests that Osborne proposed). Second, further DNA testing might conclusively establish that the genetic material found in the condom came from Osborne. And third, further testing might show that there was little or no chance that the genetic material came from Osborne.

The question confronting Judge Gleason was this: assuming that this third alternative came to pass—*i.e.*, assuming that a more discriminating DNA test showed that the genetic material did not come from Osborne—would this test result be conclusive evidence of Osborne's innocence? Based on her examination of all the evidence in Osborne's case, Judge Gleason concluded that the answer was "no."

First, Judge Gleason noted that the condom was not firmly linked to the assault on K.G. The condom

was not found until over twenty-four hours after the assault. Accordingly, it might have been coincidentally left in the vicinity by another person before the police arrived.

Second, Judge Gleason noted that the State presented extensive other evidence linking Osborne to the kidnapping and rape—primarily, the physical evidence that firmly tied Jackson to these crimes, the physical evidence that placed Osborne in Jackson's vehicle (the Space Station tickets), and the testimony of several witnesses who saw Osborne in Jackson's company both before and after the assault.

Finally, Judge Gleason noted that Osborne had confessed to these crimes when he applied for discretionary parole in 2004. The judge pointed out that Osborne had submitted a written statement to the Parole Board in which he acknowledged his participation in the kidnapping and sexual assault on K.G. In this written statement, Osborne described these crimes in some detail. Moreover, Osborne's signature on this statement appears underneath an explicit warning that he was required to "state the exact and complete truth" in his parole application, and that any lies in his statement would subject him to prosecution for unsworn falsification under AS 11.56.210.

Given all of this, Judge Gleason concluded that even if further DNA testing showed that Osborne could not have been the source of the genetic material, this would not conclusively establish Osborne's innocence. We agree.

We note that the Washington Court of Appeals in *Riofta v. State*,[12] recently confronted a similar case

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[12] 134 Wash.App. 669, 142 P.3d 193 (2006).

and reached the same conclusion—that the defendant was not entitled to post-conviction DNA testing of physical evidence.

The defendant in *Riofta* was convicted of first-degree assault with a firearm. The victim of the assault described the shooter as wearing a white hat during the assault.[13] The police later identified the owner of this white hat, but they discovered that the hat had been stolen, along with the owner's car, prior to the assault. Riofta had apparently emerged from this stolen car immediately before assaulting[14] the victim.

After Riofta was convicted, he commenced litigation under the authority of a Washington statute which provides for post-conviction DNA testing in criminal cases. Riofta asked the court to order DNA testing of the hat—arguing that if his DNA did not show up on the hat, this would establish his innocence.[15] The Washington appeals court, however, concluded that "DNA testing [might] show only who wore the hat after the car was stolen. DNA testing [would] not resolve who wore the hat during the shooting."[16]

In addition to bringing suit under the Washington statute, Riofta also argued that he had a due process right to have the hat tested for DNA.[17] In making this argument, Riofta explicitly relied on this Court's decision in *Osborne*.

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[13] *Id.* at 196.

[14] *Id.*

[15] *Id.* at 198.

[16] *Id.* at 201.

[17] *Id.*

The Washington court noted that the courts of that state "have not adopted a version of the three-part *Osborne* test."[18] But the court also observed that the Washington Supreme Court in *In re Personal Restraint of Gentry*[19] had favorably referred to a similar three-part test.[20]

Nevertheless, the *Riofta* court concluded that, under the facts of the case, Riofta could not satisfy "the critical requirement of demonstrating that DNA testing of the white hat would conclusively, or even likely, prove his innocence."[21] The court explained:

> The absence of Riofta's DNA on the white hat [would] not necessarily indicate that Riofta was not the shooter[,] because Riofta may not have transferred his DNA to the hat. For example, evidence indicates that the shooter could have worn the hat for only a relatively short period of time because the car in which the hat was located was stolen within twelve hours of the shooting. Moreover, the presence of someone else's DNA (other than the hat's owner . . .) [would] not exonerate Riofta[,] because Riofta and other persons could have worn the hat without all of them transferring DNA [to the hat.] . . . [E]ven if DNA on the white hat matched [someone else], it [would] not conclusively establish Riofta's innocence[,] given the number of

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[18] *Id.* at 203.

[19] 137 Wash.2d 378, 972 P.2d 1250 (1999).

[20] *Riofta*, 142 P.3d at 203-04 (quoting *Gentry*, 972 P.2d at 1258); *see also Osborne*, 110 P.3d at 995 n. 27 (citing *Gentry*).

[21] *Riofta*, 142 P.3d at 204.

> persons [the victim] saw in the car who may have worn the hat.[22]

The facts of *Riofta* are similar to the facts presented in Osborne's case, and we reach a similar conclusion. As Judge Gleason found, Osborne simply has not shown that further DNA testing would establish his innocence, even if the results of this testing excluded him as the source of the genetic material.

Conclusion

For the reasons explained here, we agree with Judge Gleason that Osborne failed to satisfy any portion of the three-part test that we set out in our previous decision. We accordingly conclude that Osborne has failed to show that he is entitled to further DNA testing of the physical evidence in this case.

This was the only issue left unresolved from Osborne's application for post-conviction relief. Accordingly, the judgment of the superior court (denying Osborne's application) is AFFIRMED.

MANNHEIMER, Judge, joined by Coats, *Chief Judge*, concurring.

This case raises the question of whether an Alaska court has the authority, in the absence of a pertinent statute, to order post-conviction DNA testing of physical evidence—and if so, under what circumstances a court should exercise that authority. The resolution of this question requires us to balance two competing principles of the criminal justice system. Our task is hard because both principles are crucially important to the fair administration of criminal justice.

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[22] *Id.*

The first principle is that, after we are assured that a defendant has received a trial conducted in accordance with the procedural requirements of our constitution, our statutes, and our court rules, society has a justifiable interest in prohibiting the defendant from seeking to re-open the litigation.

All of these procedural protections—at trial, on appeal, and in post-conviction relief litigation—are designed to ensure, to the extent humanly possible, that only the truly guilty are punished. To be sure, it is seldom possible to attain absolute certainty when we try to reconstruct and analyze human affairs. But after a defendant has received the benefit of all required procedural protections, society can justifiably insist that the defendant's conviction not be subjected to further attack.

As this Court explained in *Grinols v. State*,

> Society has a substantial interest in making sure that criminal litigation eventually reaches an end. All persons involved in the litigation—defendants, victims, families and friends, investigative agencies, as well as the public at large—have a right to expect that criminal cases will be finally resolved at some point. If prisoners are allowed to assert claims long after their trials, society runs the risk that re-trials may be ordered years after the event, when witnesses may no longer be available or their memories of the pertinent occurrences have been lost or diminished. In addition, piecemeal litigation of successive and often fruitless post-conviction claims poses a significant cost to the courts and the other components of the criminal justice system.

Grinols, 10 P.3d 600, 605-06 (Alaska App.2000).

Moreover, as our supreme court recognized in *Merrill v. State*,

> finality may be a crucial element [in the] effectiveness [of the criminal law]. A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of [administering] justice that cannot but war with the effectiveness of the [law's] underlying substantive commands. Furthermore, . . . an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, [is potentially inconsistent] with the aim of rehabilitating offenders.

Merrill, 457 P.2d 231, 236 (Alaska 1969).

In the present case, William Osborne was tried and convicted of sexual assault and his conviction was affirmed by this Court on appeal.[1] He then litigated and lost a claim of ineffective assistance of counsel in the superior court, and this Court affirmed the superior court's resolution of the ineffective assistance claim.[2] At this point, society has a weighty interest in insulating the jury's verdict from further attack.

Nevertheless, our criminal justice system is also founded on a second principle: that innocent people should not be punished. In theory, this second principle should not normally conflict with the first

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[1] *Jackson and Osborne v. State*, Alaska App. Memorandum Opinion No. 3330 (February 7, 1996), 1996 WL 3368644.

[2] *Osborne v. State*, 110 P.3d 986 (Alaska App.2005).

principle described above. But police investigations and jury trials are conducted by human beings.

There are times when evidence of the defendant's guilt is fabricated, or evidence of the defendant's innocence is willfully suppressed. We trust that these occasions are few. But even the most scrupulous and honest police officers, witnesses, and victims sometimes work from limited knowledge, or are hampered by preconceived notions, or are simply mistaken. And jurors must make their decision based on the evidence presented in court. In short, our justice system is run by human beings who ultimately are fallible.

Despite our society's best efforts, and despite total compliance with the procedural protections specified by law, innocent people are in fact convicted. This Court noted several instances of this in footnote 52 of our *Grinols* opinion (10 P.3d at 616). And earlier this spring, the Anchorage Daily News carried an account of yet another man who was freed after serving years in prison for a rape he did not commit. The victim initially identified the man as her attacker. But after being confronted with genetic evidence and other circumstantial evidence indicating that the wrong man had been identified, the victim acknowledged that she was no longer certain of her identification.[3] Because of this risk that we have punished the innocent, even when a defendant has been found guilty after a fair trial, the law must make some provision for re-examining a criminal conviction if it appears that the verdict is mistaken. Alaska law currently contains two such provisions.

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[3] "Judge clears man in prison for 1982 rape", Anchorage Daily News, April 10, 2007, page A-3.

Under Alaska Criminal Rule 33(c), a defendant may file a motion for a new trial based on newly discovered evidence within 180 days of the final judgement. To obtain relief under Criminal Rule 33, the defendant must make a threshold showing that the evidence is truly newly discovered, and that diligent effort would not have revealed this evidence any sooner.[4] Assuming these two requirements are met, the defendant must then convince the court that the evidence is not merely cumulative or impeaching, and that the evidence is so significant that it would probably lead to a different verdict if the defendant's case were re-tried.

Even if a defendant misses the 180-day time limit specified in Criminal Rule 33(c), the defendant can seek post-conviction relief under AS 12.72.010(a)(4) on the basis that new evidence "requires vacation of the [defendant's] conviction . . . in the interest of justice". Normally, a petition for post-conviction relief must be filed within two years of the final judgement (or within one year after that judgement is affirmed on appeal).[5] However, AS 12.72.020(b)(2)(D) declares that, "[n]otwithstanding [this time limitation], a court may hear a claim [for post-conviction relief] based on newly discovered evidence if the applicant establishes due diligence in presenting the claim and [the new evidence] establishes by clear and convincing evidence that the applicant is innocent."

The problem facing Osborne in the present case is that the DNA testing he proposes would not yield "new evidence" for purposes of either Criminal Rule

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[4] *See Dorman v. State*, 622 P.2d 448, 455-56 (Alaska 1981), quoting *Salinas v. State*, 373 P.2d 512, 514 (Alaska 1962).

[5] AS 12.72.020(a)(3)(A).

33 or AS 12.72.010(a). Under both of these provisions, a defendant must show that the evidence was not available sooner, despite diligent efforts to uncover it. But as we explained in our earlier opinion, *Osborne v. State*, 110 P.3d at 989-990, a DNA analysis of the physical evidence was conducted by the State crime laboratory in advance of Osborne's trial, and the results of this testing were available to Osborne and his attorney. It is true that Osborne now proposes a different, more discriminating DNA test—but this more discriminating DNA was also available at the time of Osborne's trial. Osborne's attorney actively debated whether to pursue this more discriminating test, but she ultimately decided not to—because the State's DNA testing was not extremely probative (roughly fifteen to sixteen percent of the relevant population had matching DNA), and because the results of a more discriminating test might have been much more incriminating to Osborne. *Id.* at 990.

(We concluded that, under these circumstances, Osborne's attorney acted competently when she chose not to pursue the more discriminating test. *Id.* at 992.)

Given these facts, it would seem that equity does not favor Osborne. Osborne's attorney could have asked for the more discriminating DNA test, but she understood the risk of performing this test, and she consciously chose to go forward without this evidence. Now, years later, Osborne asserts that the more discriminating DNA test must be run, and that his guilt must be re-evaluated.

As our supreme court explained in *Owens v. State*, 613 P.2d 259, 261 (Alaska 1980), a defendant should not be allowed to "take a gambler's risk and complain only if the cards [fall] the wrong way". See *Riofta*

v. State, 134 Wash.App. 669, 142 P.3d 193 (2006), where the Washington Court of Appeals discussed a similar case:

> [T]here is nothing "new" about the [physical evidence] or any information that [DNA testing] may [yield]. DNA testing of comparable accuracy was available at trial. Because [the defendant] chose not to test the [physical evidence] at trial does not mean that any information discoverable through post-conviction testing is now "new."
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> . . .
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> [A] strained consequence results if we were to [adopt] the hyper-literal interpretation [of "new evidence" that the defendant] urges[.] [This interpretation would] allow[ ] a defendant to take a "wait and see" position on DNA testing by trying to gain [an] acquittal without the DNA information but, following conviction, moving to test the DNA.
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> . . .
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> Accordingly, we hold that . . . [i]f a person requests [post-trial] DNA testing of evidence [and] the same or comparable testing [was available at trial, any] information that the [post-trial] testing might reveal . . . is not "new". . . .

Riofta v. State, 142 P.3d at 200.

It therefore appears that, under the applicable Alaska statutes and court rules, Osborne would not be entitled to relief even if renewed DNA testing conclusively established his innocence.

And yet, if we are indeed committed to the principle that we should not punish people who are demonstrably innocent, it would seem that our crimi-

nal justice system should have a fail-safe mechanism for reviewing criminal convictions even in situations like Osborne's—that is, even when a defendant has knowingly chosen to go to trial without seeking to uncover the evidence that the defendant now asserts will demonstrate their innocence.

If Osborne could show that he were in fact innocent, it would be unconscionable to punish him, even if that punishment would ostensibly comport with all of our law's procedural requirements. As this Court suggested in *Grinols*, 10 P.3d at 617, the due process clause of the Alaska Constitution might require us to intervene in cases where a defendant presents clear genetic evidence of their innocence, even if the rules governing motions for new trial and petitions for post-conviction relief would bar the defendant from obtaining any relief.

Here, Osborne has not offered any genetic evidence. Rather, he asks this Court to order re-testing of the condom found at the scene of the crime so that he can obtain new genetic evidence that might conceivably favor his claim of innocence.

In our prior opinion in Osborne's case, we assumed that this Court would be obliged to order the proposed DNA testing if Osborne could show that a favorable test result would conclusively establish his innocence. *Osborne*, 110 P.3d at 995. We then remanded Osborne's case to the superior court, directing the superior court to decide whether, under the facts of Osborne's case, he could meet this requirement for renewed DNA testing. *Id.*

As explained in the lead opinion, Judge Gleason concluded that even if renewed DNA testing yielded the result most favorable to Osborne—that is, even if

the renewed testing showed that Osborne could not be the source of the genetic material found on the condom—this test result would not conclusively establish Osborne's innocence.

Given the evidence in Osborne's case (both the evidence presented at Osborne's trial and the additional fact that Osborne has since confessed his guilt), Judge Gleason correctly concluded that, no matter what results the proposed DNA testing might yield, this renewed testing could not conclusively establish Osborne's innocence. Thus, even if the due process clause would require additional or renewed DNA testing in some instances, re-testing is not required in Osborne's case.

For these reasons, I agree with my colleagues that the decision of the superior court should be affirmed.

APPENDIX E

COURT OF APPEALS, OF ALASKA

No. A-8399

WILLIAM G. OSBORNE,
Appellant,

v.

STATE of Alaska,
Appellee.

April 15, 2005

Before: COATS, *Chief Judge*, and MANNHEIMER and STEWART, *Judges*.

OPINION

COATS, *Chief Judge*.

A jury convicted William G. Osborne of kidnapping, first-degree assault and two counts of first-degree sexual assault.[1] Osborne appealed his convictions, and this court affirmed.[2] Osborne then filed an application for post-conviction relief on the ground that his trial counsel provided him ineffective assistance because she decided not to seek more advanced DNA testing on some of the physical evidence that connected Osborne to the crime. Superior Court Judge Sharon Gleason denied Osborne's application on the

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[1] *Osborne v. State*, Alaska App. Memorandum Opinion and Judgment No. 5329 at 6 (Feb. 7, 1996).

[2] *Id.* at 19.

ground that he failed to establish a prima facie case that he received ineffective assistance from his attorney. Osborne appeals. We affirm Judge Gleason's decision that Osborne did not establish a prima facie case of ineffective assistance. Osborne also argues that he has a due process right to further DNA testing of the evidence. We remand to allow Judge Gleason to reconsider her decision whether to allow Osborne the opportunity to have further DNA tests performed.

Factual and procedural background

The underlying factual and procedural history of Osborne's case was previously explained in *Osborne v. State.*[3]

On March 22, 1993, Dexter C. Jackson and Osborne invited K.G. into Jackson's car with the promise that they would pay her $100 for oral sex. Jackson and Osborne took K.G. to a secluded spot at the west end of Northern Lights Boulevard, ignoring her request that they park along Spenard Road. During the ride along Northern Lights Boulevard, Jackson and Osborne asked K.G. if she was armed, and when she told them that she had a Swiss army knife, they asked if they could look at the knife. They took the knife and placed it on the car's dashboard when she surrendered it.

When the three stopped at the end of the street, the men asked K.G. to perform fellatio on each of them with the understanding that she would be paid afterward. When K.G. told Osborne and Jackson that she would not perform without first being paid, Osborne pointed a gun at her and told her, "I think you will."

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[3] *Id.* at 1-6.

Jackson and Osborne took what little money K.G. had, made K.G. strip, and then had sex with her. K.G. performed oral sex on Jackson while Osborne penetrated K.G. vaginally with his finger and his penis. Afterward, Osborne ordered K.G. to "get out of the car, bitch, and lay down in the snow, face down."

When K.G. stayed in the car and began pleading for her life, Jackson hit K.G. in the head with the gun and Osborne choked her after being urged to do so by Jackson. In her extreme fear, K.G. defecated on the front passenger seat of Jackson's car. Osborne scooped up some of the excrement and rubbed it in K.G.'s face, hair, and clothing. When she was able to do so, K.G. grabbed some of her clothes and fled a short distance from the car where she began to dress.

The two men took a piece of wood, probably an ax handle, from the back of the car and began to strike K.G. in the back of her head and in her ribs. When K.G. tried to run, Osborne battered her knees repeatedly, telling her, "go down, bitch, go down." Jackson and Osborne hit and kicked K.G. until she fell down. Jackson continued to pound K.G. in the area of her pubic bone with the stick even after she had fallen. At one point, Osborne allowed K.G. to stand up, but then hit her in the head with the ax handle.

K.G. decided to pretend that she was dead, and curled into a fetal position in the snow. At trial, K.G. recounted how she had heard the gun discharge and felt the bullet graze her head. K.G. believed, based on glimpses of her assailants' feet and of Osborne's sweatsuit, that it was Osborne who had shot her. The State produced expert testimony at trial showing that one of K.G.'s head injuries was a "shallow gouge" injury consistent with a close scrape with a bullet.

Jackson and Osborne then buried K.G. in the snow, believing that she was either dead or dying.

K.G. heard Jackson's car drive away. She continued to lie under the snow for some time to make sure that her attackers had left the area, then got up. After walking toward town for a short while, K.G. was able to flag down a passing automobile. K.G. told the car's driver and passenger what had happened to her; she also described the men who had attacked her and the car that they had driven. K.G. asked to be taken home because she wished to avoid the police. The driver and passenger of the car complied with her request.

The next day, the incident was reported to the police by a neighbor of one of the occupants of the car that had taken K.G. home. When she was contacted by the police, K.G. was initially uncooperative, but was persuaded to describe what had happened to her and to turn over the clothes that she had been wearing. The clothes were soiled with feces. A presumptive test indicated that semen was present on one piece of clothing, but no semen was recovered. K.G. also underwent a physical examination and most of her injuries were photographed.

On March 28, 1993, at about 12:30 a.m., military police stopped Jackson's car on Fort Richardson. The military police were aware that the Anchorage Police Department had circulated composite drawings of a car and two black males, and further noted that Jackson, his passenger (who was not Osborne), and the car resembled the drawings. The police testified at trial that they had initially stopped Jackson because he had been flashing his headlights at a pickup driving in front of him. When Jackson opened his glove compartment in order to retrieve the title to his car,

an officer saw a gun case. The case contained Jackson's .380 caliber automatic pistol.

When the military police searched the car, they found a box of ammunition for the gun under the passenger seat. During a search of Jackson, the military police found K.G.'s Swiss army knife in his pocket. (The knife was uniquely marked and dented and K.G. was able to readily identify it.) The officers arrested Jackson and the passenger and took them to the military police station.

The military police turned over the car and items seized to the Anchorage Police Department. Anchorage police officers found additional ammunition in a subsequent search of the car. The municipal police also detected blood in the car. Subsequent DNA testing of this blood, using a PCR (polymerase chain reaction) analysis of the DQ-alpha locus (a particular region of the DNA molecule), showed that the genetic makeup of the blood matched K.G.'s genetic makeup—a match that could be expected in 4.4 to 4.8% of white females. Fibers matching the carpeting were found on one of the sweaters K.G. had been wearing that night.

K.G. later identified both Jackson and Osborne in photographic lineups. She also identified Jackson's car.

An investigation of the scene of the assault, conducted on the evening of March 23, revealed an area of disturbed and bloody snow. The police also discovered two pairs of K.G.'s bloody gray stretch pants, a used blue condom, and an expended round of .380 ammunition that was later determined to have come from Jackson's gun. Tire tracks on the scene matched those made by Jackson's car.

A pubic hair taken from the blue condom and another found on the sweater K.G. had worn on the night of the assault had the same characteristics as Osborne's pubic hair. Another Negroid hair found on K.G.'s sweater did not match any of the suspects investigated by police. Sperm in the condom matched Osborne's DNA (based on PCR testing of his DQ-alpha locus). Osborne's DNA type is shared by between 14.7% and 16% of the African-American population.

An ax handle was later found 114 feet from the crime scene. Osborne used similar ax handles in his work and one was found during a search of his room. Jackson was also known to keep a similar kind of stick in the back seat of his car.

Jackson and Osborne were tried jointly before a jury. Superior Court Judge Milton M. Souter presided over the trial. Jackson was convicted of kidnapping,[4] first-degree sexual assault,[5] first-degree assault,[6] and third-degree assault.[7] Osborne was convicted of kidnapping, first-degree assault, and two counts of first-degree sexual assault. Judge Souter sentenced Jackson to a composite sentence of 27 years with 5 years suspended. He sentenced Osborne to 26 years with 5 years suspended. Osborne appealed his convictions and this court affirmed.[8]

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[4] AS 11.41.300(a)(*l*)(c).

[5] AS 11.41.410(a)(1).

[6] AS 11.41.200(a)(4).

[7] AS 11.41.220.

[8] *Osborne*, Alaska App. Memorandum Opinion and Judgment No. 5329 at 19.

Osborne then filed an application for post-conviction relief on the ground that his trial counsel, Sidney K. Billingslea, provided him ineffective assistance because she decided not to seek more discriminating DNA tests. Osborne alleged that Billingslea was ineffective because, among other things, she did not seek more specific genetic testing of the physical evidence (*i.e.*, the condom with semen, a pubic hair, and hair on the sweater). At the time of Osborne's trial, a substantially more discriminating genetic test was available than the DQ-alpha PCR DNA test that was done by the State. In support of his application, Osborne requested the court order the physical evidence against him retested using the more discriminating DNA test to determine if Osborne was prejudiced by his trial counsel's failure to seek the more precise testing. Osborne argued that he is innocent, that he sought more discriminating DNA testing at the time of his trial, and that more specific DNA testing of the physical evidence in the case would prove Billingslea's decision was incorrect as well as prove his innocence.

In support of his application for post-conviction relief, Osborne submitted an affidavit from Billingslea. In her affidavit, Billingslea stated that she had consulted with the State's DNA crime lab expert and reviewed various materials regarding DNA testing. She also spoke with another attorney who had litigated the scientific basis of DNA testing. Billingslea concluded:

> I consulted with the DNA expert from the state crime lab about the process used here, and the reasons for using the less sophisticated method. I reviewed DNA research articles, some of which may be in the file, and some not. I spoke with

> and reviewed the material submitted by Geoff Wildredge, a Fairbanks public defender who was litigating the scientific basis of DNA at the time under the *Frye* standard. [because the State was relying on the less precise PCR test] The statistics were heavily in our favor, especially when compared with the census population statistics at the time. If I correctly recall, Osborne's DNA turned up in roughly 1:8 or 1:16 [sic, actually greater than one in seven] of the population.

Billingslea explained that she chose not to seek additional and more specific DNA testing, not because of the possible cost, but rather because "the statistics were in Osborne's favor, due to a relatively high frequency in the population of the profile of the case DNA." Consequently, Billingslea concluded that "Osborne was in a strategically better position without [more specific] DNA testing." Billingslea reasoned:

> The State was using the local crime lab's PCR DNA testing, which included Osborne as a possible donor of the semen found in a condom at the crime scene. However, the ratio of possible donors to the general population was [small, in the neighborhood of 1:16]. I felt these were very good numbers in a mistaken identity, cross-racial identification case, where the victim was in the dark and had bad eyesight. Given the codefendant's confession which included Osborne as a perpetrator, and the absence of an air-tight alibi, I believed then, and now, that insisting on a more advanced . . . DNA test would have served to prove that Osborne committed the alleged crimes.

Billingslea further stated that "[w]hile I do not have a present memory of Osborne's desire to have [a more specific discriminatory] test of his DNA done, I am willing to accept that he does, and that I would have disagreed with him, as I preferred the lower odds given in PCR testing."

Judge Gleason denied Osborne's application for post-conviction relief on the ground that Osborne had failed to make a prima facie case of ineffective assistance of counsel. Judge Gleason concluded that Billingslea investigated and considered the possibility of engaging in the more discriminating DNA test, but because "she disbelieved Osborne's statement that he did not commit the crime," she "elected to avoid the possibility of obtaining DNA test results that might have confirmed Osborne's culpability." Judge Gleason found that Billingslea made a tactical decision and that there was no basis to conclude that Billingslea's decision was incompetent. Judge Gleason also denied Osborne's related request to have the physical evidence tested by more discriminating DNA tests because Osborne did not allege facts demonstrating that his trial attorney's representation was deficient.

Osborne sought reconsideration of the court's order which was denied. He argued that he was entitled to have further DNA testing done as a matter of due process to establish his innocence. Judge Gleason reiterated:

> that under the specific facts of this case, including the tactical decisions made by . . . Osborne's trial counsel, state and federal due process and fairness do not mandate a right to post-conviction DNA testing in this particular case. Further, the court finds that . . . Billingslea's investigation of the case, including her investigation of the dif-

ferent types of DNA testing available, was not "outside the wide range of professionally competent assistance."

Osborne appeals the superior court's denial of his application for post-conviction relief.

Osborne did not establish a prima facie case of ineffective assistance of counsel

Alaska uses a two-pronged standard for evaluating ineffective assistance of counsel claims.[9] "The first prong requires the accused to prove that the performance of trial counsel fell below an objective standard: Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations."[10] The second prong requires a showing of prejudice: "[T]here must be a showing that the lack of competency contributed to the conviction. If the first burden [the burden of proving deficient performance] has been met, all that is required additionally is to create a reasonable doubt that the incompetence contributed to the outcome."[11] "The law presumes that an attorney has acted competently, and that the attorney's decisions were prompted by sound tactical considerations. To prevail in a post-conviction relief action based on [an] ineffective assistance of counsel claim the defendant must rebut this presumption."[12]

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[9] *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974).

[10] *State v. Jones*, 759 P.2d 558, 567 (Alaska App. 1988).

[11] *Id.* at 567-68.

[12] *Newby v. State*, 967 P.2d 1008, 1016 (Alaska App.1998) (footnote omitted).

Our review of the record convinces us that Judge Gleason did not err in concluding that Osborne did not establish a prima facie case that Billingslea provided him with ineffective assistance of counsel. Billingslea's affidavit establishes that she researched and considered the possibility of having more conclusive DNA tests performed on the evidence in the case, but made a tactical decision not to seek further testing because she concluded that further testing had a substantial chance of harming Osborne's case. Osborne did not present any evidence to rebut the presumption that Billingslea's decision was sound. Billingslea concluded that, if she obtained more advanced testing, her actions might result in the State obtaining additional evidence that would incriminate Osborne. She concluded that Osborne was better off with the DNA test which the State performed. This test allowed her to argue that a substantial portion—better than one in seven—of the African-American population would have matched the genetic material obtained in the sperm from the condom. Billingslea's affidavit established that her decision was a tactical one.

Osborne contends that Billingslea told him that the Office of Public Advocacy would not pay for independent DNA testing. Billingslea denied saying this. But even assuming that Osborne's statement is true, Billingslea gave a separate tactical reason for not wanting additional testing; therefore, Osborne has failed to show incompetence.

Osborne argues that he consistently asserted his innocence and asked Billingslea to obtain a more discriminating DNA test. But, as Osborne recognizes in his reply brief, the decision about whether to request additional testing was a decision for his counsel. In

Simeon v. State,[13] this court pointed out that Alaska Rule of Professional Conduct 1.2(a) instructs that in a criminal case the client has the final authority to decide what plea to enter, whether to waive jury trial, whether to testify, and whether to take an appeal. We stated:

> The rule specifies clearly those decisions over which the client has the ultimate authority. Since the rule limits the client's authority to those decisions, it follows that the lawyer had the ultimate authority to make other decisions governing trial tactics . . ."

The evidence before Judge Gleason was that Osborne's attorney made a tactical decision not to request further DNA testing. Osborne has not presented any evidence that this was an unreasonable tactic—a tactic that no competent counsel would adopt. We conclude that Judge Gleason did not err in determining that Osborne had not established a prima facie case of ineffective assistance of counsel.

Osborne's potential due process right to have more DNA tests performed

In the superior court, Osborne's primary contention was that his trial attorney was incompetent for failing to pursue the more discriminating DNA testing that was available at the time of Osborne's trial. As part of his requested relief, Osborne asked the superior court to order the more discriminating DNA tests performed on the physical evidence in his case. As we have previously explained, Osborne did not establish that his trial attorney's decision was incompetent. Osborne was therefore not entitled to any relief

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[13] 90 P.3d 181, 184 (Alaska App.2004).

under this theory—even if we assume that further DNA testing would be favorable to him.

But after Judge Gleason rejected Osborne's ineffective assistance of counsel claim, Osborne then raised a new theory of post-conviction relief: He contended that he had a due process right to have the physical evidence retested so that he could show that he was factually innocent of the crimes for which he was convicted. Judge Gleason rejected Osborne's due process claim, and Osborne now appeals this ruling.

Osborne points out that there are cases where defendants convicted of crimes have been exonerated by later DNA testing. He argues that, under the due process clauses of both the Alaska and Federal Constitutions, he has the right to perform further tests on the physical evidence.

(As an alternative legal basis for his claim that he is entitled to new DNA testing, Osborne relies on AS 12.55.015(h) and AS 44.41.035(a).[14] But these statutes merely set up a system for collecting the DNA of people who are convicted of certain offenses. These statutes do not provide a procedure for defendants seeking post-conviction relief to obtain physical evidence and subject it to DNA testing.)

As we explain here, there are several problems with Osborne's due process contention.

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[14] AS 44.41.035(a) declares that "the Department of Public Safety shall establish a deoxyribonucleic acid (DNA) identification registration system." AS 12.55.015(h) directs sentencing courts to order the collection of genetic samples from persons convicted of specified crimes for inclusion in the state DNA registry.

A provision of Alaska's post-conviction relief statute, AS 12.72.020(b)(2), declares that a defendant is entitled to post-conviction relief if the defendant presents newly discovered evidence that "establishes by clear and convincing evidence" that the defendant is innocent.[15] But this same provision declares that a claim based on newly discovered evidence will be heard only if the defendant "establishes due diligence in presenting the claim" and further shows that the evidence supporting the claim "was not known within . . . two years after entry of the judgment of conviction."[16]

The State points out that Osborne's due process claim is apparently barred by this statute because the physical evidence in this case is not newly discovered, because the DNA testing that Osborne proposes to perform on this evidence existed at the time of Osborne's trial, and because Osborne's trial attorney was aware of this and consciously chose not to seek more specific testing.

In *Grinols v. State*,[17] we suggested (without resolving the issue) that the due process clause of the Alaska Constitution would require some avenue of relief "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[18] Even though Osborne's claim of innocence is apparently barred by AS 12.72.020(b)(2)—because of the statute's twin requirements of (1) evidence that is truly new or newly discovered and (2) due diligence

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[15] AS 12.72.020(b)(2)(D).

[16] AS 12.72.020(b)(2)(A).

[17] 10 P.3d 600 (Alaska App.2000).

[18] *Id.* at 615 (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986)).

in pursuing the claim—it might still be argued that the due process clause requires us to ignore the wording of the statute and allow Osborne to pursue his claim, as long as there is some chance that he could prove himself innocent by clear and convincing evidence.

But *Grinols* speaks of a due process right to rectify a *constitutional violation* that has resulted in the conviction of someone who is factually innocent. It is not clear that there has been any constitutional violation in Osborne's case. We have already rejected Osborne's contention that his trial attorney was incompetent for failing to seek more discriminating DNA testing. And, at least under federal law, a defendant who has received a fair trial apparently has no due process right to present new post-conviction evidence, even when that evidence would demonstrate the defendant's innocence.

This issue was presented to the United States Supreme Court in *Herrera v. Collins*.[19] The issue in *Herrera* was the constitutionality of Texas's 30-day time limit on motions for a new trial based on newly discovered evidence. The Court ruled that it is constitutional for a state to enforce such a time limit—even when there is no other statutory remedy available for bringing a claim of actual innocence. The Court in *Herrera* further held that the existence of newly discovered evidence relevant to the guilt of a prisoner is not a ground for relief under the federal Habeas Corpus Act: "[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."[20]

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[19] 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

[20] *Id.* at 400, 113 S.Ct. at 860.

Concurring in *Herrera*, Justices Scalia and Thomas expressed their belief that "[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding . . . a [constitutional] right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."[21]

Our research has disclosed several cases in which courts granted defendants' requests for post-conviction DNA testing, relying (or apparently relying) on the rationale that due process demanded such testing.[22] But many of these cases were decided before

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[21] *Id.* at 427-28, 113 S.Ct. at 874. (Scalia, J., concurring).

[22] The following cases address, either directly or indirectly, a due process or fundamental fairness right to post-conviction DNA testing: *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir.1996) (reversing the district court's refusal to permit a habeas petitioner alleging ineffective assistance of counsel to conduct DNA tests that were not available at time of trial, where the petitioner consistently maintained his innocence and claimed the test results could exonerate him); *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F.Supp.2d 366, 370 (E.D. Pa.2001) ("plaintiff has a due process right of access to the genetic material for the limited purpose of DNA testing"); *Sewell v. State*, 592 N.E.2d 705, 707-08 (Ind.App.1992) (finding "the analysis of fundamental fairness issues relative to DNA testing persuasive," and explaining that *Brady v. Maryland*, which requires the prosecution to disclose exculpatory evidence, "is implicated in post-conviction requests for forensic tests . . . where a conviction rested largely upon identification evidence and advanced technology could definitively establish the accused's innocence"); *State v. Thomas*, 245 N.J.Super. 428, 586 A.2d 250, 251-54 (Ct.App.Div.1991) (reversing "the order denying defendant's motion for DNA testing of the rape kit material and cell samples supplied by him" because "considerations of fundamental fairness demand the testing"); *Dabbs v. Vergari*, 149 Misc.2d 844, 570 N.Y.S.2d 765, 767-69 (N.Y.App.1990) (relying in part on the due process clause, the court held that the evidence should be subject to discovery and DNA testing

Herrera. This means that, to the extent these cases relied on a federal due process analysis, their reasoning and conclusions are now suspect. After *Herrera*, the tide is definitely against any purported federal due process right to post-conviction DNA testing.[23]

Several courts have flatly interpreted the *Herrera* decision to mean that defendants have no federal due process right to present post-conviction evidence of their innocence—that if defendants are to have such a right, it must be granted by the legislature.[24]

The strongest rejection of a federal due process right to post-conviction DNA testing is found in *Harvey v. Horan*:[25]

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even after conviction when the evidence has been preserved and has a high exculpatory potential); *Commonwealth v. Brison*, 421 Pa.Super. 442, 618 A.2d 420, 423-25 (1992) (principles of justice required remand to trial court to allow defendant to engage in DNA testing). *But see Arizona v. Youngblood*, 488 U.S. 51, 58-59, 109 S.Ct. 333, 337-38, 102 L.Ed.2d 281 (1988) (due process clause is not violated when the police fail to use a particular investigatory tool, such as a newer test, on semen samples).

[23] *See, e.g.*, Spencer *v. Murray*, 5 F.3d 758, 765 (4th Cir.1993) (holding that actual innocence is not itself a constitutional claim, and that the defendant's assertion of potential errors in prior DNA tests could not form the basis for federal habeas relief, since the defendant was claiming factual innocence rather than any error at his trial).

[24] *See* State *v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737, 746-47 (2000) (holding that there is no constitutional right to demand judicial consideration of newly discovered evidence after the statutory time limit has expired for seeking a motion for new trial based on newly discovered evidence-and that this is true even if the new evidence establishes the defendant's factual innocence); *see also Sewell v. State*, 592 N.E.2d 705, 708 (Ind. App.1992) (holding that a defendant has no federal due process right to discovery of new evidence).

[25] 278 F.3d 370 (4th Cir.2002).

Harvey would have this court fashion a substantive right to post-conviction DNA testing out of whole cloth or the vague contours of the Due Process Clause. We are asked to declare a general constitutional right for every inmate to continually challenge a valid conviction based on whatever technological advances may have occurred since his conviction became final. The Supreme Court has made clear that the finality of convictions cannot be brought into question by every change in the law. . . . Similarly, we believe that finality cannot be sacrificed to every change in technology. The possibility of post-conviction developments, whether in law or science, is simply too great to justify judicially sanctioned constitutional attacks upon final criminal judgments.

In so holding, we acknowledge that finality is not a value that trumps all others. In some circumstances newly discovered evidence may warrant a new trial. *See, e.g., United States v. Christy*, 3 F.3d 765, 768 (4th Cir.1993). But there is no newly discovered evidence in this case. Instead, Harvey seeks to subject existing biological evidence to new DNA testing. This evidence was already subjected to DNA testing using the best technology available at the time Harvey's conviction became final. Establishing a constitutional due process right under § 1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state. This we cannot do. In *Teague* [*v. Lane*], the [Supreme] Court stressed that finality "is essential to the operation of our criminal justice system," and that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." 489 U.S. [288,] 309, 109 S.Ct.

> 1060 [103 L.Ed.2d 334] (plurality opinion). *See also McCleskey v. Zant*, 499 U.S. 467, 491-92, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). While finality is not the sole value in the criminal justice system, neither is it subject to the kind of blunt abrogation that would occur with the recognition of a due process entitlement to post-conviction access to DNA evidence.
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> In [reaching this decision] . . . we do not declare that criminal defendants should not be allowed to avail themselves of advances in technology. Rather, our decision reflects the core democratic ideal that if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right. Permitting Harvey's § 1983 claim to proceed would improperly short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right.[26]

It appears, therefore, that Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence.

As explained above, Alaska law—AS 12.72.020(b)(2)—does allow convicted defendants to present new evidence to establish their factual innocence, but only if the evidence is newly discovered, and only if the defendant exercises due diligence in presenting his or her claim. Because of these two statutory restrictions, Osborne apparently does not qualify for post-conviction relief. Thus, even if Osborne could show that more discriminating DNA testing would yield results fav-

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[26] *Id.* at 375-76.

orable to him, Osborne seemingly could not obtain post-conviction relief unless we were ready to declare, as a matter of Alaska constitutional law, that these two statutory restrictions are unconstitutional (or, at least, unconstitutional as applied to Osborne).

We acknowledge that several state courts have held that defendants have a due process right, under their respective state constitutions, to obtain post-conviction DNA testing of physical evidence, and to offer the results of that testing to establish their factual innocence. But even these court decisions present a legal hurdle to Osborne. The great majority of these decisions strictly circumscribe the due process right to post-conviction DNA testing. These cases hold that a defendant is not entitled to this testing unless the defendant shows (1) that their conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue.[27]

It is not clear, from the record before us, that Osborne could meet this three-part test. The State, for its part, contends that the rest of its case against Os-

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[27] *See People v. Washington*, 171 Ill.2d 475, 216 Ill.Dec. 773, 665 N.E.2d 1330, 1336-37 (1996); *Sewell*, 592 N.E.2d at 708; *Williams v. State*, 791 N.E.2d 193, 194 (Ind.2003); *Mebane v. State*, 21 Kan.App.2d 533, 902 P.2d 494, 497 (1995); *State v. White*, 260 N.J.Super. 531, 617 A.2d 272, 276-77 (Ct.App. Div.1992); *Commonwealth v. Reese*, 444 Pa.Super. 38, 663 A.2d 206, 208-09 (1995); *Jenner v. Dooley*, 590 N.W.2d 463, 471-72 (S.D.1999); *Commonwealth v. Robinson*, 452 Pa.Super. 606, 682 A.2d 831, 837-38 (1996); *In re Personal Restraint of Gentry*, 137 Wash.2d 378, 972 P.2d 1250, 1258 (1999); *see also Barnabei v. Angelone*, 214 F.3d 463, 474 (4th Cir.2000); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir.1997).

borne was so strong that, even if Osborne were allowed to conduct the proposed DNA testing, and even if the results of that testing were to favor Osborne, Osborne still could not show that these favorable results constituted clear and convincing proof of his innocence. However, the State concedes that Judge Gleason did not reach this issue.

In spite of the substantial legal hurdles that we have described here, we are reluctant to hold that Alaska law offers no remedy to defendants who could prove their factual innocence. We are prepared to hold, however, that a defendant who seeks post-conviction DNA testing must, at a minimum, meet the three-part test endorsed by the state courts whose decisions we discussed above. That is, the defendant must show (1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue.

We therefore remand Osborne's case to the superior court. The superior court should consider whether Osborne can meet this test. In addition, the superior court should consider whether, even assuming that Osborne meets this test, his claim is nevertheless barred by the twin statutory limitations codified in AS 12.72.020(b)(2)—the requirements that (1) the evidence be truly new or newly discovered and that (2) Osborne showed due diligence in pursuing the claim.

Finally, if the superior court determines that Osborne satisfies the three requirements for post-conviction DNA testing, but also that his claim is barred by AS 12.72.020(b)(2), the superior court should then consider whether the due process clause of the Alaska

Constitution requires us to disregard the statutory limitations and allow Osborne to pursue his claim.

Judge Gleason may hold any further proceedings that she believes would be necessary or helpful in reaching these decisions. The judge shall issue findings and rulings on these issues within 90 days. The parties shall then have 30 days to file memoranda responding to Judge Gleason's findings and rulings. When we have received Judge Gleason's findings and rulings, as well as any memoranda filed by the parties, we shall resume our consideration of Osborne's claim that he has a due process right to obtain post-conviction DNA testing of the physical evidence.

We retain jurisdiction of this case.

APPENDIX F

COURT OF APPEALS OF ALASKA

Nos. A-5276, A-5329

DEXTER C. JACKSON,
Appellant,

v.

STATE OF ALASKA,
Appellee.

WILLIAM G. OSBORNE,
Appellant,

v.

STATE OF ALASKA,
Appellant.

Feb. 7, 1996

Before: BRYNER, *Chief Judge*, COATS and MANNHEIMER.

MEMORANDUM OPINION AND JUDGMENT

COATS, *Judge*.

On March 22, 1993, Dexter C. Jackson and William G. Osborne invited K.G. into Jackson's car with the promise that they would pay her $100 for oral sex. The two took K.G. to a secluded spot at the west end of Northern Lights Boulevard, ignoring her request

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that they park along Spenard Road. During the ride along Northern Lights Boulevard, Jackson and Osborne asked K.G. if she was armed, and when she told them that she had a Swiss army knife, they asked if they could look at the knife. They took the knife and placed it on the car's dashboard when she surrendered it.

When the three stopped at the end of the boulevard, the men asked K.G. to perform fellatio on each of them with the understanding that she would be paid afterward. When K.G. told Osborne and Jackson that she would not perform without having first been paid, Osborne pointed a gun at her and told her, "I think you will."

Jackson and Osborne took what little money K.G. had, made K.G. strip, and then had sex with her. K.G. performed oral sex on Jackson while Osborne penetrated K.G. vaginally with his finger and his penis. Afterward, Osborne ordered K.G. to "get out of the car, bitch, and lay down in the snow, face down."

When K.G. stayed in the car and began pleading for her life, Jackson hit K.G. in the head with the gun and Osborne choked her after being urged to do so by Jackson. Fearing that she would die, K.G. defecated on the front passenger seat of Jackson's car. Osborne scooped up some of the excrement and rubbed it in K.G.'s face, hair, and clothing. When she was able to do so, K.G. grabbed some of her clothes and fled a short distance from the car where she began to dress.

The two men took a piece of wood, probably an axe handle, from the back of the car and began to strike K.G. in the back of her head and in her ribs. When K.G. tried to run, Osborne battered her knees repeatedly, telling her, "go down, bitch, go down."

Jackson and Osborne hit and kicked K.G. until she fell down. Jackson continued to pound K.G. in the area of her pubic bone with the stick even after she had fallen. At one point, Osborne allowed K.G. to stand up, but then hit her in the head with the axe handle.

K.G. decided to pretend that she was dead, and curled into a fetal position in the snow. At trial, K.G. recounted how she had heard the gun discharge and felt the bullet graze her head. K.G. believed, based on glimpses of her assailants' feet and of Osborne's sweatsuit, that it was Osborne who had shot her. The state produced expert testimony at trial showing that one of K.G.'s head injuries was a "shallow gouge" injury consistent with a close scrape with a bullet. Jackson and Osborne then buried K.G. in the snow, believing that she was either dead or dying.

K.G. heard Jackson's car drive away. She continued to lie under the snow for some time to make sure that her attackers had left the area, then got up. After walking toward town for a short while, K.G. was able to flag down a passing automobile. K.G. told the car's driver and passenger what had happened to her; she also described the men who had attacked her and the car that they had driven. K.G. asked to be taken home because she wished to avoid the police. The driver and passenger of the car complied with her request.

The next day, the incident was reported to the police by a neighbor of one of the occupants of the car that had taken K.G. home. When she was contacted by the police, K.G. was initially uncooperative, but was persuaded to describe what had happened to her and to turn over the clothes that she had been wearing. The clothes were soiled with feces. A pre-

sumptive test indicated that semen was present on one piece of clothing, but no semen was recovered. K.G. also underwent a physical examination and most of her injuries were photographed.

On March 28, 1993, at about 12:30 a.m., military police stopped Jackson's car on Fort Richardson. The military police were aware that the Anchorage Police Department had circulated composite drawings of a car and two black males, and further noted that Jackson, his passenger (who was not Osborne), and the car resembled the drawings. The police testified at trial that they had initially stopped Jackson because he had been flashing his headlights at a pickup driving in front of him. When Jackson opened his glove compartment in order to retrieve title to his car, an officer saw a gun case. The case contained Jackson's .380 caliber automatic pistol.

When the military police searched the car, they found a box of ammunition for the gun under the passenger seat. During a search of Jackson, the military police found K.G.'s Swiss army knife in his pocket. (The knife was uniquely marked and dented and K.G. was able to readily identify it.) The police arrested Jackson and the passenger and took them to the Military Police station.

The military police turned over the car and items seized to the Anchorage Police Department (APD). Anchorage police officers found additional ammunition in a subsequent search of the car. The municipal police also detected blood in the car; a D.Q. alpha sample from the passenger door matched K.G.'s D.Q. alpha type, which occurs in between 4.4% and 4.8% of white females. Fibers matching the carpeting were found on one of the sweaters K.G. had been wearing that night. K.G. later identified both Jackson and

Osborne in photographic lineups. She also identified Jackson's car.

An investigation of the scene of the assault, conducted on the evening of March 23, revealed an area of disturbed and bloody snow. The police also discovered two pairs of K.G.'s bloody gray stretch pants, a used blue condom, and an expended round of .380 ammunition which was later determined to have come from Jackson's gun. Tire tracks on the scene matched those made by Jackson's car.

A pubic hair taken from the blue condom and another found on the sweater K.G. had worn on the night of the assault had the same characteristics as Osborne's pubic hair. Another Negroid hair found on K.G.'s sweater did not match any of the suspects investigated by police. Sperm in the condom matched Osborne's D.Q. Alpha type, which is shared by between 14.7% and 16% of the African-American population.

An axe handle was later found 114 feet from the crime scene. Osborne used similar axe handles in his work and one was found when his room was searched. Jackson was also known to keep a similar kind of stick in the back seat of his car.

Jackson and Osborne were tried jointly before a jury. Superior Court Judge Milton M. Souter presided over the trial. Jackson was convicted of kidnapping, first-degree sexual assault, first-degree assault, and third-degree assault. Osborne was convicted of kidnapping, first-degree assault and two counts of first-degree sexual assault.[1] Judge Souter sentenced

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[1] Jackson was acquitted of attempted first-degree murder, solicitation to commit first-degree murder, and one count of sexual assault in the first degree. Osborne was acquitted of two

Jackson to a composite sentence of twenty-seven years with five years suspended. He sentenced Osborne to twenty-six years with five years suspended. The defendants appeal their convictions and sentences to this court. We affirm.

Jackson contends that Judge Souter erred in refusing to suppress evidence which the military police found when they searched Jackson's car. Jackson contends that the military police did not have legal grounds to stop his car. He also contends that the actions of the military police violated the Posse Comitatus Act.

The military police officers who stopped Jackson testified that they stopped him during the early morning hours of March 28, 1993.[2] The officers testified that they observed Jackson flash his headlights several times at a car in front of him. As a result of seeing this activity, they made a traffic stop of Jackson. After pulling Jackson's car over, the military police approached the car. One MP was on each side of the car. They asked Jackson for his license and registration. When Jackson opened his glove compartment to get his registration, the military police officer on the passenger side of the car saw a black gun case. He alerted his partner that there

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counts of attempted first-degree murder and one count of sexual assault.

[2] In reviewing Judge Souter's ruling on the suppression motion we have considered the testimony presented at grand jury and at trial. We have previously ruled that we will consider evidence presented at trial to support the trial court's ruling on a suppression issue even though this evidence was not available to the trial court at the time the court ruled on the suppression issue prior to trial. *Hubert v. State*, 638 P.2d 677, 680 n. 2 (Alaska App. 1981).

was a gun in the car, and the military police ordered Jackson and his passenger out of the car. At this point, the military police searched Jackson and the passenger for weapons. They also searched the car for weapons and ammunition.

The military police could validly stop Jackson's car to enforce traffic regulations. *Resecker v. State*, 721 P.2d 650, 652 (Alaska App. 1986). The state points out that when Jackson flashed his high beams at the car in front of him he violated the Alaska Traffic Code, which the military police were authorized to enforce on Fort Richardson. Alternatively, the police could have stopped Jackson since the repeated flashing of his high beams may have indicated that his headlights were defective. *See Russell v. Municipality of Anchorage*, 706 P.2d 687, 689 (Alaska App. 1985) (misty rear view mirror justified stop to permit driver to clear window); *State v. Fuller*, 556 A.2d 224 (Me. 1989) (when car approaching officer blinked headlights four or five times in quarter mile, officer could stop vehicle because headlights might have been defective).[3] We therefore conclude that Judge

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[3] Jackson contends that the state cannot argue for the first time on appeal that the stop was justified because of a moving violation, i.e., the flashing of bright headlights within 300 feet of another vehicle. However, we may affirm a trial court ruling for reasons other than those argued below. *See McGee v. State*, 614 P.2d 800, 805 n. 10 (Alaska 1980), *cert. denied*, 450 U.S. 967 (1981). The state did raise the argument that the flashing bright headlights may have signified a potentially dangerous malfunction. Jackson contends that there was no evidence that he was within 300 feet of the vehicle in front of him. However, it is a reasonable inference from the officer's testimony that Jackson was flashing his lights at a car ahead of him and that the car ahead of him was within 300 feet.

Souter did not err in finding that the military police legally stopped Jackson's car.

We also conclude that Judge Souter did not err in finding that the military police did not violate the Posse Comitatus Act. In *McNeil v. State*, 787 P.2d 1036, 1037 (Alaska App. 1990), we stated: "It is well settled . . . that the Posse Comitatus Act is not violated when military officers pursue a legitimate and independent military purpose." In *McNeil*, a military police officer on duty at Fort Richardson Military Reservation stopped McNeil when he saw him driving in an erratic manner because he suspected McNeil was intoxicated. After speaking to McNeil, the MP decided that McNeil was not intoxicated. However, when he learned from a computer check that McNeil's driver's license was suspended, the MP contacted the Alaska State Troopers, who arrested McNeil for driving while his license was suspended. *Id.* We found no violation of the Posse Comitatus Act and concluded that the MP "stopped McNeil in order to protect motorists travelling on military property from the danger of intoxicated drivers." *Id.* We concluded that the MP "acted with [a] legitimate military purpose." *Id.* The present case appears to us to be similar to *McNeil*. The military police legitimately stopped Jackson for a traffic violation and/or to determine if his headlights were defective. When they asked Jackson for his license and registration, they saw that he had a concealed pistol in his glove compartment. In order to protect themselves, the military police had Jackson and his passenger get out of the car, searched them for weapons, and searched the car for weapons. When the police realized that Jackson's car matched the description in an Anchorage Police Department bulletin, they turned Jackson, the car, and evidence they

found in the weapons check over to the Anchorage Police Department. Judge Souter could properly find that the military police were pursuing a "legitimate and independent military purpose" in stopping Jackson and searching him. Turning Jackson over to the Anchorage Police did not violate the Posse Comitatus Act because the military police acted on their own initiative. *Id.* Accordingly, Judge Souter did not err in determining that there was no violation of the Posse Comitatus Act.

Jackson next contends that Judge Souter erred in denying his motion to dismiss the indictment. Jackson first argues that the state presented evidence to the grand jury which was the product of an illegal search and seizure. Previously in this decision we have concluded that this evidence was not illegally seized. We accordingly conclude that Judge Souter did not err in refusing to dismiss the indictment on this theory.

Jackson contends that the state presented insufficient evidence to the grand jury to show that he committed a kidnapping. He contends that his restraint of K.G. was so closely related to the sexual assault in time and place that there was insufficient evidence of restraint to constitute a kidnapping. *Alam v. State*, 793 P.2d 1081, 1083-84 (Alaska App. 1990); *Alam v. State*, 776 P.2d 345, 347-50 (Alaska App. 1989).

The elements of kidnapping are set forth in AS 11.41.300(a)(1)(c): "A person commits the crime of kidnapping if . . . the person restrains another with intent to . . . inflict physical injury upon or sexually assault the restrained person." The definition of "restrain" is set forth in another part of Chapter 41:

> "restrain" means to restrict a person's movements unlawfully and without consent, so as to interfere substantially with the person's liberty by moving the person from one place to another or by confining the person either in the place where the restriction commences or in a place to which the person has been moved; a restraint is without consent if it is accomplished . . . by force, threat, or deception.

AS 11.41.370(3)(A).

The evidence which the state presented to the grand jury supported the theory that Jackson and Osborne committed kidnapping by restraining K.G. through the use of deception. AS 11.41.370(3)(B). Based upon the evidence presented to the grand jury, the grand jury could reasonably conclude that Jackson and Osborne intended to sexually assault K.G. when they contacted her. They lured her into the car by promising to pay her for sex. They then drove her to an isolated area where they could carry out their sexual assault on K.G. in a place where they would not be disturbed and she would be unable to get help or escape.

Jackson contends that there was insufficient evidence before the grand jury to charge him with sexual assault. He points out that K.G. was willing to perform sexual acts for money. However, the evidence presented to the grand jury shows that Jackson and Osborne forced K.G. to perform the sexual acts at gun point. *See* AS 11.41.470(8)(A). The evidence presented to the grand jury supported the inference that K.G. performed the sexual acts without consent.

Jackson cursorily argues that Judge Souter erred in denying a mistrial motion which he made at the

conclusion of the prosecutor's opening statement. We conclude that this argument is not adequately briefed, and is therefore waived. *Kristich v. State*, 550 P.2d 796, 804 (Alaska 1976).

Jackson next contends that Judge Souter erred when instructing the jury on kidnapping. The instruction provided, "A person commits the crime of kidnapping if the person restrains another person with intent to inflict physical injury or sexually assault the person. . . ." The instructions defined "restraint" as meaning "to restrict a person's movements unlawfully and without consent" and provided that a restraint is "without consent" if "it is accomplished by force, threat, or deception." Jackson claims that the jury instruction for kidnapping did not adequately define the term "deception."

The trial court's original definition for the term "deception" read, in relevant part, "[d]eception means to knowingly promise performance that the defendant does not intend to perform or knows will not be performed." This language borrows verbatim from the statutory definition of deception provided in AS 11.81.900(b)(14)(E). Jackson opposed this instruction at trial, arguing that it would allow the conviction of a person for kidnapping for simply picking up a prostitute, having sex with her, and then refusing to pay.

In response to Jackson's argument, Judge Souter modified the instruction by adding the words "at the time the promise is made." Thus, the given instruction stated:

"Deception" means to knowingly:

> create or confirm another's false impression that the defendant does not believe to be true, in-

cluding false impressions as to law or value and false impressions as to intention or other state of mind;

fail to correct another's false impression that the defendant previously has created or confirmed;

prevent another from acquiring information pertinent to the disposition of the property or service involved; or

promise performance that at the time the promise is made the defendant does not intend to perform or knows will not be performed.

The language in the instruction mirrors that of AS 11.81.900(b)(14) except for the language added by the trial court. Even after the change, Jackson continued to complain that the instruction did not satisfy his objection.

The instructions on kidnapping adequately set out the Alaska Statutes and clearly required the jury to find that Jackson and Osborne restrained K.G. "with intent to inflict physical injury or sexually assault" her. Jackson's complaint that the jury could have convicted him for having sex with a prostitute and then refusing to pay her has no merit. Under the definition of kidnapping the jury could not have convicted Jackson unless it concluded he restrained K.G. with the specific intent to sexually assault or injure her. The instructions which Judge Souter gave set out the requirements for establishing kidnapping by deception. We find no error.

Jackson next contends that Judge Souter erred in denying his motions for judgment of acquittal and for a new trial. Following the jury's verdict, Jackson filed a motion for a judgment of acquittal or, in the

alternative, for a new trial. In support of his motion, Jackson cited newspaper articles which purported to quote a juror describing jury deliberations. Jackson argued that these newspaper articles supported his contention that the jury misunderstood and misapplied the court's instructions. Jackson's attempt to impeach the verdict was totally at odds with Evidence Rule 606(b), which provides as follows:

> (b) *Inquiry Into Validity of Verdict or Indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not be questioned as to any matter or statement occurring during the course of the jury's deliberations or to the effect of any matter or statement upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

We conclude that Judge Souter did not err in refusing to consider Jackson's claim that the jury misunderstood the instructions.

Jackson also contends that Judge Souter erred in failing to instruct the jury on the misdemeanor offense of theft of services. AS 11.46.200(a). However, Jackson concedes that he never proposed such an instruction. Since Jackson did not object, he must

show plain error. Criminal Rule 30(a) and 47(b). Jackson has not shown plain error.

Jackson argues that there was insufficient evidence at trial to convict him of kidnapping and sexual assault. In determining whether there is sufficient evidence to support a verdict, a court asks whether a reasonable jury, viewing the evidence in the light most favorable to the state, could conclude that the accused's guilt was proven beyond a reasonable doubt. *Hansen v. State*, 845 P.2d 449, 451 (Alaska App. 1993). A reasonable jury could have concluded that Jackson kidnapped and sexually assaulted K.G.

Jackson next contends that there was insufficient evidence to convict him of the crime of first-degree assault. He argues that there was insufficient evidence of the "serious physical injury" required for a conviction under AS 11.41.200(a)(1).

Alaska Statute 11.81.900(51) defines "serious physical injury" as:

> (A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or
>
> (B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy.

At trial, K.G. testified that she suffered pain for four to six weeks after the assault, and that some of her injuries continued to ache at the time of trial. K.G. also claimed to suffer hearing problems, including blood discharges from one ear for several months after the assault occurred. In addition, there

was substantial evidence from which the jury could have concluded that K.G. could easily have died from the effects of the assault and being buried in the snow. Viewed in the light most favorable to the state, reasonable jurors could conclude that K.G. suffered serious physical injury as a result of the assault.

Osborne raises several arguments that the evidence was insufficient to support his conviction. Osborne first contends that the evidence was insufficient to show that K.G. was restrained sufficiently to support the kidnapping charge. This argument is identical to the argument previously raised by Jackson. However, the evidence in this case was sufficient to support the finding that Osborne and Jackson committed kidnapping by deception: that they lured K.G. into Jackson's car by falsely promising that they would pay her for sex, intending to take her to an isolated area where they could sexually assault her. Once they removed K.G. to that isolated area, they sexually assaulted K.G. by forcing her to submit to them by use of a firearm. These facts support Osborne's conviction on the kidnapping charge.

Osborne next contends that, according to the facts in the case, there was insufficient time for him to have committed the crime. Osborne presents evidence of the time frame in which the kidnapping, rape, and physical assault occurred, and argues that he could not possibly have been involved in the offenses since "[t]he evidence leaves less than 15 to 20 minutes to commit all of the alleged acts."

Despite Osborne's painstaking reconstruction of the temporal evidence presented at trial, the evidence was sufficient to show that the acts occurred. When the facts adduced at trial are viewed in the light most favorable to the state and K.G.'s testimony is cred-

ited, a jury could reasonably believe K.G.'s testimony that the assault occurred and conclude beyond a reasonable doubt that Osborne was present during the assault despite inconsistencies and uncertainties in the witnesses' estimations of time.

Osborne also contends that the state presented insufficient evidence at trial to support K.G.'s identification of him as one of the people who kidnapped her. However, when we review the evidence in the light most favorable to the state, it is apparent that a reasonable jury could have concluded that there was sufficient evidence to prove beyond a reasonable doubt that Osborne kidnapped, sexually assaulted, and assaulted K.G.

Jackson and Osborne both appeal their sentences. Judge Souter sentenced Jackson, a twenty-four-year-old first felony offender, to a composite sentence of twenty-seven years with five years suspended. He sentenced Osborne, a twenty-one-year-old first felony offender, to a composite sentence of twenty-six years with five years suspended. In sentencing Jackson and Osborne, Judge Souter considered the fact Jackson and Osborne had apparently led exemplary lives prior to this offense and that their rehabilitation was entitled to serious consideration in sentencing. However, he concluded that, in spite of this excellent prior record, he needed to impose a severe sentence because of the seriousness of the offense. He observed that it was surprising that the jury had found the defendants not guilty of attempted murder, and found that the evidence was very clear that they had fired a shot which grazed K.G.'s head and that they had left her for dead. He found that it was "nearly miraculous" that K.G. survived the attack. He observed that she easily could have been killed by the

bullet or that she could have been knocked out long enough to die of exposure.

Jackson contends that Judge Souter erred in finding the aggravating factor that during his commission of assault in the first degree his conduct "manifested deliberate cruelty to another person." AS 12.55.155(c)(2). Jackson's conviction for assault in the first degree was based on his actions in beating K.G. repeatedly with the axe handle. In finding this aggravating factor, Judge Souter found that Jackson had hit K.G. repeatedly with the axe handle and that he had left her for dead in the snow. Judge Souter's finding is supported by the record and supports his finding of the aggravating factor. *See Jones v. State*, 765 P.2d 107, 109 (Alaska App. 1988)(setting out requirements to establish the deliberate cruelty aggravator).

Jackson also argues that Judge Souter erred in rejecting a proposed mitigating factor: that "the conduct constituting the offense was among the least serious conduct included in the definition of the offense." AS 12.55.155(d)(9). In rejecting this mitigating factor, Judge Souter found that the offense was far from the least serious. This finding is supported by the record and support Judge Souter's findings rejecting the proposed mitigating factor.

Jackson and Osborne argue that their sentences are excessive. In *Williams v. State*, 800 P.2d 955 (Alaska App. 1990), *on reconsideration*, 809 P.2d 931 (Alaska App. 1991), we analyzed prior sentencing decisions for first felony offenders who were convicted of both kidnapping and sexual assault. We summarized those decisions as follows:

> These decisions indicate that an aggregate term of twenty years or less will normally be appropriate for a first felony offender in a kidnap/rape case; a longer sentence will be warranted only when the kidnapping is aggravated in its own right, either because of its duration or because the defendant actually placed the victim's life in jeopardy by means of the abduction.

Id. at 959 (footnote omitted). In a footnote, we went on to point out that "it is also conceivable that a composite term of more than twenty years might be justified in a first offense kidnap/rape case if the circumstances surrounding the victim's sexual assault were exceptionally serious." *Id.* at 959 n. 4. Judge Souter properly found that Osborne and Jackson's kidnap/rape case was substantially aggravated by their conduct during the crime. In particular, Jackson and Osborne severely beat K.G., shot her, and left her for dead. These findings clearly justified the sentence which Judge Souter imposed. We conclude that the sentence was not clearly mistaken.

The convictions and sentences are AFFIRMED.

OPPOSITION BRIEF

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No. 08-6

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In The

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT and ADRIENNE BACHMAN, DISTRICT ATTORNEY,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF IN OPPOSITION

The Petition should be denied for three reasons. First, the legal issues it concerns – whether certain convicted persons may conduct previously-unavailable DNA testing, at no cost to the State, in order to establish their actual innocence – is one that in 2008 is almost exclusively addressed by state statute, rather than federal constitutional law. Second, the rare occasions that the federal courts have been asked to consider applications for DNA testing under 42 U.S.C. §1983 have not yielded an active circuit split on either of the questions petitioners ask the Court to address. Instead, the federal courts' consideration of such suits has proceeded cautiously, and the shallow split that briefly existed concerning the propriety of using 42 U.S.C. §1983 as a vehicle was put to rest by this Court's decision in *Wilkinson v. Dotson*, 544 U.S. 74 (2005). Finally, the decision below was correct, constituting an appropriate and narrowly tailored application of the Due Process Clause to the facts of respondent Osborne's compelling case.

STATEMENT

In March 1993, two men drove a woman named K.G. to a secluded, wooded area in Anchorage, Alaska and brutally assaulted her. Pet. App. 2a-3a. Only one of the men – the passenger in the vehicle, later alleged by the State to be Osborne – vaginally raped K.G. *Id.* 3a.

The passenger-rapist used a blue condom that K.G. had in her possession. *Id.* Upon canvassing the crime scene with K.G. the day after the assault, police recovered a blue condom containing semen. *Id.* 4a. The condom was located in close proximity to tire tracks that investigators concluded (based on the track pattern and the light layer of snow that had fallen the previous evening) had been made by the assailants' vehicle; it was also near a shell casing and the disturbed, bloody berm of snow where the assailants had shot K.G. and left her for dead. *Id.* Investigators also recovered two pubic hairs for analysis: one from the used condom, and one from K.G.'s sweater. The pubic hairs had "negroid features"; both assailants were black, while K.G. is white. *Id.* 6a.

After K.G. identified Osborne in a photo array as the man who looked "most like" the passenger-rapist, he was convicted by a jury of sexual assault, assault, and kidnapping in 1994. *Id.* 2a, 4a. Osborne maintained his innocence of the crime, asserting a misidentification and alibi defense. In particular, his counsel noted that Osborne was at least 40 pounds lighter and 5-10 years younger than the rapist described by K.G.; that she had reported the rapist was clean-shaven, yet Osborne had a moustache; and that K.G. was not wearing her glasses that night, with this highly traumatic event taking place in a dark area. *Id.* 7a.

The testimony of two forensic experts was crucial to the State's case against Osborne. First, a DNA analyst from the State's crime laboratory described

how he had subjected the semen from the condom to an early-generation form of DNA testing ("DQ Alpha"), which analyzes the alleles (genetic markers) present at a single location. He testified that Osborne's DQ-Alpha profile was consistent with the sperm on the condom. Yet the expert also conceded that the same DQ-Alpha profile was shared by as many as 14.7 to 16 percent of African Americans, *i.e.*, 1 in every 6 or 7 black men. *Id.* 5a. As such, the discrimination power provided by this form of testing, at a time when forensic DNA typing was in its infancy, was no greater than that of conventional serology, in that the genetic markers typed could be as common as standard ABO blood types.[1]

Both parties considered sending the semen evidence for more discriminating RFLP-DNA analysis (which, like DQ-Alpha, is no longer utilized by forensic DNA laboratories). However, RFLP testing required a larger, better-quality semen sample than the State's expert determined was present in the condom. *Id.* 5a-6a. For her part, defense counsel made what she later characterized as a "strategic" decision to forgo any further attempts at DNA testing, out of concern that the results could inculpate Osborne; she could not recall, however, whether (as Osborne maintained in

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[1] *See, e.g.*, George Garraty et al., *ABO and Rh(D) phenotype frequencies of different racial/ethnic groups in the United States*, 44 TRANSFUSION 703, 704 (May 2004) (reporting that Type AB antigens are found in 4.3%, and Type B antigens found in 19.7%, of African Americans).

post-conviction proceedings) he affirmatively requested that she pursue more discriminating DNA testing pretrial, stating only that she "would have disagreed with him" had he done so. *Id.* 6a, 99a.

A state criminalist also analyzed the "Negroid" pubic hairs found in the condom and on K.G.'s sweater, and told the jury that they each "exhibited the same microscopic features" as Osborne's hair. *Id.* 6a. Based upon the DQ-Alpha test results and the microscopic hair analysis, the prosecutor argued to the jury that both the pubic hair and semen evidence "matched" Osborne. *Id.* 32a; C.A. App. 48, 139, 144, 147, 150. For its part, the defense did not dispute that the pubic hair and semen were deposited by the passenger-rapist – only whether the State's witnesses had established that Osborne was in fact that man.

All three items of forensic evidence remain in the State's possession. It is also undisputed that after trial, two advanced forms of forensic DNA testing became widely available, both of which have the capacity to determine to a virtual scientific certainty whether or not the State correctly alleged that Osborne was the source of this semen and pubic hair evidence. Pet. App. 16a-17a. These methods – STR and mitochondrial DNA testing – are now routinely utilized by crime laboratories nationwide to obtain highly discriminating DNA profiles from small, degraded samples of semen and hair evidence. *Id.* 5a, 11a, 47a.

Osborne first sought leave of the Alaska Superior Court to release this evidence for advanced DNA testing. *Id.* 8a. His petition, filed pursuant to Alaska's general post-conviction relief statute (Alaska, unlike most other states, has no statutory vehicle for post-conviction DNA testing) asserted both state and federal constitutional grounds. *Id.* He next filed suit in federal court pursuant to 42 U.S.C. §1983, alleging that petitioners' refusal to allow him to test the evidence using newly-available DNA techniques, at no cost to the State, violated several of his federally protected rights. *Id.*

In 2003, petitioners moved to dismiss, arguing, *inter alia*, that under *Heck v. Humphrey*, 512 U.S. 477 (1994), Osborne's DNA access suit was not cognizable under §1983. The district court granted the motion, but the Ninth Circuit reversed (*see* Pet. App. 51a) ("*Osborne I*"). The court concluded that because Osborne sought only DNA access, and would need to file an entirely separate action to obtain relief from his conviction and release from custody – one that would never be brought if the results were inconclusive or inculpatory – the *Heck* rule, which bars only those §1983 actions that "necessarily imply" the invalidity of a conviction or sentence, was inapplicable. *See* Pet. App. 58a-59a (quoting *Heck*). Petitioners did not seek *certiorari* after *Osborne I*.

After the merits of his constitutional claims were remanded to the district court, Osborne prevailed, *see* Pet. App. 46a, and the Ninth Circuit affirmed. Writing for a unanimous panel, Judge Brunetti concluded

that petitioners' refusal to permit Osborne access to the DNA evidence violated his Fourteenth Amendment right to due process of law, under the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Pet. App. 15a-26a. The court rested its due process analysis on no fewer than six factors present in Osborne's case, including that the DNA testing sought (1) involves evidence used to secure the conviction; (2) uses methods unavailable at trial that (3) are far more precise than the methods then available; (4) can conclusively determine whether Osborne is the source of the evidence; (5) can be conducted at no cost or prejudice to the State; and (6) is material to other forms of post-conviction relief still available to Osborne. *Id.* 44a.

Judge Brunetti carefully traced the myriad ways that DNA testing could prove dispositive in this regard. In particular, he reasoned, STR-DNA tests on the condom could not only exclude Osborne as the source of the sperm therein, but *also* confirm that the epithelial cells identified on the outside of the condom are from the victim, K.G.; similarly, the tests could show a common male profile among the sperm in the condom and the pubic hair recovered from K.G.'s sweater. *Id.* 37a-38a. This would decisively put to rest petitioners' "newly imagined" theory (advanced for the first time in post-conviction DNA proceedings, and in direct contradiction to their own arguments to the jury at trial) that the semen might not be connected to the crime after all. *Id.* 38a-39a. Further, entering any exclusionary STR-DNA profile into the

state and national DNA databank could "solidify Osborne's case for innocence" by yielding a "hit" to a known offender. *Id.* 39a; *see also infra* note 26 and accompanying text.

This petition followed. Notably, in the wake of Judge Brunetti's detailed opinion in *Osborne II,* the State appears to have abandoned its former contention that the DNA testing Osborne seeks could not prove his actual innocence or yield viable grounds for post-conviction relief (whether through the courts or clemency), but challenge only whether §1983 is an appropriate vehicle for obtaining access to that evidence.

REASONS FOR DENYING THE PETITION

I. The Issue of Access to Post-Conviction DNA Testing, While Fundamental, is Almost Exclusively Addressed Under State Law

Having spent more than six years in litigation over a simple request to conduct DNA testing, at his own expense, on the forensic evidence that was used to convict him, Osborne naturally does not quarrel with petitioners' characterization of the issue of post-conviction DNA access as one of great "importance," nor with its recognition of the power of this new technology to conclusively identify the perpetrators of crime and exonerate the wrongfully convicted. *See* Pet. 9, 24. As former Attorney General John Ashcroft

has observed, DNA testing is "nothing less than the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent."[2] Yet it is precisely this broad national consensus about the probative value of DNA evidence that has led the states (and Congress) to address the issue – enacting, in little more than a decade, a broad array of legislation to afford DNA testing to convicted persons, and largely obviating the need for the federal courts to hear such claims.

The rapid pace of legislation also reflects this consensus. At the time of Osborne's March 1994 conviction, when forensic DNA testing was in its infancy, not a single state had a statute providing a vehicle for convicted persons to obtain DNA testing.[3] Today, forty-three states and the District of Columbia have such laws, the vast majority of which were enacted this decade.[4] And in 2004, Congress passed

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[2] *See* Naftali Bendavid, *U.S. Targets DNA Backlog*, CHI. TRIB., Aug. 2, 2001, at 10 (comments made at DOJ news conference to announce new funding for president's DNA initiatives).

[3] The first state to do so, New York, enacted a post-conviction DNA testing law in August 1994. The next state, Illinois, did not act until four years later. *See infra* n.4.

[4] *See* Ariz. Rev. Stat. §13-4240; Ark. Code Ann. §16-112-201; Cal. Penal Code §1405; Colo. Rev. Stat. §18-1-411; Conn. Gen. Stat. Ann. §52-582 (2003); Del. Code. tit. 11, §4504; D.C. Code Ann. §22-4133; Fla. Stat. Ann. §925.11; Ga. Code Ann. §5-5-41(c); Haw. Rev. Stat. §§844D-121-133; Idaho Code §19-4902; 725 Ill. Comp. Stat. Ann. 5/116-3; Ind. Code Ann. §35-38-7; Iowa Code §81.10; Kan. Stat. Ann. §21-2512; Ky. Rev. Stat. §422.285; La. Code Crim. Proc. Ann. art. 926.1; Me. Rev. Stat. Ann. tit. 15,

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(by overwhelming bipartisan vote) and President Bush signed similar legislation into law; the Justice for All Act ("JFAA") gives the nation's more than 200,000 federal prisoners a statutory right to petition for post-conviction DNA testing, where such testing could produce new, material evidence in support of a claim of actual innocence. *See* 18 U.S.C. §3600.

The states' recognition of the importance of meaningful access to post-conviction DNA testing has further been reflected in statutory amendments. A number of state legislatures have, for example, revised their original DNA testing statutes to account for subsequent advances in DNA technology;[5] to expand the class of eligible petitioners;[6] to eliminate

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§2137; Md. Code Ann., Crim. Proc. §8-201; Mich. Comp. Laws §770.16; Minn. Stat. §590.01; Mo. Rev. Stat. §547.035; Mont. Code Ann. §§46-21-110, 53-1-214; Neb. Rev. Stat. §29-4120; Nev. Rev. Stat. §176.0918; N.H. Rev. Stat. Ann. §651-D:1-D:4; N.J. Stat. Ann. §2A:84A-32a; N.M. Stat. Ann. §31-1a-2; N.Y. Crim. Proc. Law §440.30(1-a); N.C. Gen. Stat. §15A-269; N.D. Cent. Code Ann. §29-32.1-15; Ohio Rev. Code Ann. §2953.71; Or. Rev. Stat. §138.510 *et seq.*; Pa. Stat. Ann. 42 §9541 *et seq.*; R.I. Gen. Laws §10-9.1-11; Tenn. Code Ann. §40-30-403; Tex. Code Crim. Proc. Ann. art. 64.01 *et seq.*; Utah Code Ann. §78-35a-301; Vt. Stat. Ann. tit. 13, §5561 *et seq.*; Va. Code Ann. §19.2-327.1; Wash. Rev. Code §10.73.170; W. Va. Code Ann. §15-2B-14; Wi. Stat. Ann. §974.07; Wyo. Stat. Ann. §7-12-302-315.

[5] *See, e.g.*, Ark. Code Ann. §16-112-202(2) (2005); 725 Ill. Comp. Stat. Ann. 5/116-3 (a)(2) (2007).

[6] *See, e.g.*, Fla. Stat. Ann. §925.11(1)(a)(2) (2006) (amended to permit motions by persons convicted by plea of guilty or *nolo contedere*); N.Y. C.P.L. §440.30(1-a) (2004) (amended to permit motions to be filed by persons convicted after January 1, 1996).

statutes of limitation or expand the time in which testing applications may be filed;[7] and to relax the burden of proof required of petitioners who seek testing that may exculpate them.[8]

Access to post-conviction DNA testing in state court has also been facilitated by the executive and legislative branches of the federal government. In September 1999, the United States Department of Justice's National Commission on the Future of DNA Evidence ("the DOJ Commission") – a bipartisan group of law enforcement officials, attorneys, forensic scientists, and other criminal justice professionals – issued a comprehensive report surveying the legal landscape and proposing a framework to apply when convicted persons sought access to DNA testing.[9] Among other things, the DOJ Commission noted the disconnect between the states' traditional laws on post-conviction relief and the new capabilities of DNA

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[7] *See, e.g.*, Fla. Stat. Ann. §925.11(1)(b) (2006); La. Code Crim. Proc. Ann. art. 926.1(3) (2003).

[8] *See, e.g.*, Tex. Code Crim. Proc. Ann. §64.03(a)(2)(a) (2003); *Smith v. State*, 165 S.W.3d 351, 363-64 (Tex. Crim. App. 2005) (discussing legislative history of 2003 amendments to statute, requiring defendant seeking DNA testing to demonstrate only that "had [exculpatory] DNA results been available at trial, there is a 51% chance that the defendant would not have been convicted," rather than prove actual innocence.

[9] *See* Nat'l Instit. of Just., U.S. Dep't of Just., *Postconviction DNA Testing: Recommendations for Handling Requests*, Pub. No. NCJ 177626, Sept. 1999 (available at http://www.ncjrs.gov/pdffiles1/nij/177626.pdf) (last visited August 28, 2008).

technology, and identified certain categories of cases in which reasonable parties should readily concur on the propriety of allowing DNA testing without litigation.[10]

The DOJ Commission's call to action was answered by a spate of legislative activity: while only two states (New York and Illinois) had post-conviction DNA testing laws at the time the report was issued, an additional forty-one and the District of Columbia soon followed suit. Congress and the President have also sought to assist the states' efforts, appropriating $5 million for each of five fiscal years to fund laboratory services for indigent prisoners who successfully petition a state court for DNA testing.[11]

Osborne's §1983 action was necessitated by the fact that his home state – Alaska – is an outlier, one of just seven yet to enact a post-conviction DNA testing law. Alaska is also the only state in the Ninth Circuit without such a law.[12] Yet that may not remain

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[10] *See id.* at 3-5, 9-10. Furthermore, Respondent's case is precisely the kind of fact pattern (a rape committed by two assailants, in which semen from the crime was identified and preserved) that was identified by the DOJ Commission as a "Category 1" case, in which the exonerative potential of DNA testing is so evident that the state should concur on the propriety of testing without litigation. *See id.* at 4.

[11] *See* Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, 42 U.S.C. §14136e (West 2004).

[12] *See supra* n.4. The Ninth Circuit also includes Guam (an unincorporated territory) and the Northern Mariana Islands (a

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true for long. In the 2006 legislative session, a post-conviction DNA testing bill, H.B.325, was approved by both the Judiciary and Finance Committees of Alaska's House of Representatives. *See* 2005 A.K. HB 325 (NS). Although agreement as to the bill's final language was not achieved by the time session ended, leading the bill's sponsor to withdraw it from consideration before a vote, proponents of the law have recently renewed their calls for legislative action.[13]

The prospect that a statutory vehicle may soon become available to afford the DNA testing Osborne seeks in this action thus raises a real possibility that, even if this Court were inclined to resolve the issues petitioners claim warrant its attention, state legislative action may moot the case before the Court issues a decision. Indeed, since petitioners apparently no longer deny that DNA testing has the scientific potential to establish Osborne's actual innocence of the crimes for which he was convicted, the State presumably would not contest his entitlement to relief were he to file a DNA testing motion pursuant to a duly-enacted Alaska statute. That is essentially what transpired in *Harvey v. Horan*, 285 F.3d 298

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commonwealth), neither of which have post-conviction DNA testing statutes.

[13] *See* Bill Oberly, *Evidence Preservation Should be a Priority*, ANCHORAGE DAILY NEWS, April 8, 2008 (noting Alaska's lack of statutes regarding post-conviction DNA preservation and testing).

(4th Cir. 2002), the first §1983 DNA access case to reach the federal circuit courts.[14]

Given this large and still-growing body of state statutory law, then, it should be unsurprising that in 2008, the federal courts are rarely the forum through which post-conviction DNA testing is sought or obtained. Indeed, out of the 220 convicted persons in the U.S. who have been exonerated by DNA testing to date, only one obtained his exculpatory DNA tests through a §1983 action.[15]

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[14] In *Harvey*, the plaintiff's suit for DNA access was denied by a three-judge panel, which held that the suit was barred by *Heck* and further opined that his underlying constitutional claims were without merit. While his petition for rehearing *en banc* was pending, however, Harvey obtained an order for DNA testing pursuant to a recently-enacted state DNA testing statute, thereby mooting the underlying controversy. *See id.* at 298. While two judges of the Fourth Circuit (one who was a member of the panel and one who was not) wrote separately to set forth their disparate views on the merits of the constitutional claims raised, they agreed that the intervening state court action deprived the *en banc* court of the power to rehear the case. *Id.* at 298; *id.* at 304, 325 (Luttig, J., respecting the denial of rehearing *en banc*).

[15] That petitioner, Bruce Godschalk of Pennsylvania, was convicted in 1986 of two rapes, after giving a detailed confession to the crimes, which he recanted at trial; at that time, however, DNA was unavailable to test the truth or falsity of his claims. He sought DNA testing post-conviction in the mid-1990s, when Pennsylvania had no post-conviction DNA testing statute; he was denied on the ground that his case did not fit the limited criteria under which the state courts had previously granted testing, with the court commenting that evidence of Godschalk's guilt appeared "overwhelming." *See Comm. v. Godschalk*, 679

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And there are still other factors that account for the relative rarity of post-conviction DNA access cases in federal court. One is the inherently limited class of would-be petitioners who bring such claims. Forensic experts estimate that only 5-10% of felony crimes involve biological evidence from the perpetrator that would be suitable for DNA testing.[16] More fundamentally, the class of persons who require *post-conviction* DNA testing to substantiate a claim of innocence is effectively unique to this historical moment, given (1) the now-widespread availability of DNA testing at the trial level, and (2) the extraordinary power and precision of the Short Tandem Repeat ("STR") DNA testing method that is now used by every local, state, and national DNA laboratory in the

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A.2d 1295, 1296-97 (Pa. Super. 1996). Finally, in a case of first impression, he secured DNA testing after filing suit under §1983. *See Godschalk v. Montgomery County Dist. Att'y's Office*, 177 F. Supp. 2d 366 (E.D. Pa. 2001). The DNA test results conclusively established Godschalk's actual innocence of both crimes and led to his release from prison and dismissal of all charges. *See* David Rudovsky & Seth F. Kramer, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 550-51 (2002). Four months after Godschalk's release (which received considerable attention statewide), the Pennsylvania General Assembly unanimously enacted a post-conviction DNA testing statute, 42 Pa. C.S.A. §9543.1.

[16] *See, e.g.*, Testimony of Michael M. Baden, M.D., director of the Medicolegal Investigations Unit of the New York State Police, before the United States Senate Committee on the Judiciary, July 31, 2003, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=886&wit_id=2494 (last visited Sept. 14, 2008).

United States. STR-DNA testing, though not validated for forensic use until 1999, has rapidly become the "gold standard" of DNA analysis – both because of its ability to obtain DNA profiles from small and degraded samples, and of its power to generate profiles that are, as a statistical matter, "effectively unique" in the world's population.[17] Thus, the limited class of persons with viable claims for post-conviction DNA access – whether in state or federal court – is confined not only to those for whom biological evidence was actually collected and preserved, but also to those convicted at a time when DNA was either wholly unavailable or (as at Osborne's trial) still at a rudimentary stage of development.

II. There is No Active Circuit Split on Either Question Presented

According to petitioners, the federal circuit cases that have addressed post-conviction DNA access claims since the advent of STR-DNA testing have divided on two issues: (1) whether such claims are cognizable under §1983 or are, instead, barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), and (2) whether the State's refusal to permit access to

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[17] *See, e.g.*, *Harvey II* (Luttig, J., respecting the denial of rehearing *en banc*), 285 F.3d at 305; John M. Butler, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 146 (2d ed. 2005); Nat'l Instit. of Just., U.S. Dep't of Just., *The Future of Forensic DNA Testing* 39-40 (Nov. 2000); *Banks v. United States*, 490 F.3d 1178, 1188 (10th Cir. 2007).

potentially exculpatory DNA evidence violates a convicted person's rights under the Due Process clause of the Fourteenth Amendment.[18]

Both of petitioners' contentions are incorrect. A short-lived split among the first three circuits to consider the *Heck* issue in this context was vitiated two years ago by this Court's decision in *Wilkinson v. Dotson*, 544 U.S. 74 (2005) – with all three circuits to weigh in since *Dotson* expressly recognizing that it allows suits like Osborne's to proceed. As for the substantive constitutional questions in these cases,

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[18] Although the petition frames the right-of-DNA-access issue raised in the Circuits to date as one exclusively grounded in *Brady* and its progeny, in both the instant case and the three others cited by petitioner as evidencing the alleged split (from the Fourth, Sixth, and Eleventh Circuits), the courts were also asked to consider alternative, equally compelling grounds for relief – including that denial of access to potentially exculpatory DNA evidence violates the petitioners' First and Fourteenth Amendment right of access to courts, and due process rights to effectively pursue parole and executive clemency. As discussed in Part II.B *infra*, each of these decisions clearly leaves open the door for litigants within these same Circuits to obtain DNA testing on one or more of these grounds, including, but not limited to, the *Brady* claim upon which the Ninth Circuit granted relief to Osborne. Moreover, in this case, as the grant of relief on *Brady* grounds obviated the need to address Osborne's alternative claims, *see* Pet. App. 44a n.4, meaning that a reversal by this Court would result in at most a remand. And if the lower courts on remand grant relief on an alternative ground – such as the one proposed by Judge Luttig in his *Harvey II* concurrence – that would almost certainly lead petitioners, who are so firm in their refusal to permit Osborne to conduct DNA testing, to seek review by this Court yet again.

the various Circuits have, in the handful of decisions issued to date, adopted an understandably cautious approach – primarily disposing of the cases on their facts, and reserving the constitutional questions for another day – a course of action that has yielded, at most, a shallow split among them. The fact-bound nature of these decisions, and the substantial areas of doctrinal agreement that is actually reflected within the various opinions, further establish that this "split," such as it is, does not warrant this Court's intervention at this time.

A. Post-*Dotson*, the Circuits are in Agreement that DNA Access Claims are Cognizable Under Section 1983

Puzzlingly, petitioners cite this Court's 2005 opinion in *Dotson* for the general, undisputed proposition that state prisoners may not use §1983 as a vehicle to directly challenge the fact or duration of imprisonment, *see* Pet. 11 – yet fail to acknowledge that the courts of appeals have uniformly read that very decision to require a result adverse to the State's position on the very access-to-DNA-evidence issue upon which *certiorari* is sought. Petitioners' claim of a circuit split boldly disregards the widely-recognized and decisive impact of *Dotson*.

In 2002, three circuits considered the *Heck* issue in the DNA-access context. The Eleventh Circuit, applying the plain terms of *Heck*, concluded that success in a prisoner's suit seeking only DNA *testing*

of evidence was cognizable under §1983, since "[n]othing in that result necessarily demonstrates or even implies that his conviction is invalid." *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002). This was so, the *Bradley* Court reasoned, because the testing could well prove inculpatory or inconclusive (thus providing no grounds to challenge the conviction), and even exculpatory results would require the convicted person to file an entirely separate action to initiate such a challenge. *Id.*

Two other circuits reached a different result. The Fourth Circuit, divided 2-1 on this issue, focused on the plaintiff's underlying motives for the suit. Because the plaintiff sought DNA testing "as a first step in undermining his conviction," and "believes that the DNA test results will be favorable and will allow him to bring a subsequent motion to invalidate his conviction[,]" the court reasoned, the *Heck* bar applies. *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002) ("*Harvey I*").[19] The Fifth Circuit adopted *Harvey I's* reasoning in a brief per curiam decision. *See Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002).[20]

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[19] As previously noted, however, the underlying controversy in *Harvey I* was mooted while a petition for rehearing *en banc* was pending, by a state court's grant of relief under a newly enacted statute. *See supra note 15* and accompanying text.

[20] Petitioners also cite an unpublished decision of the Sixth Circuit, *Boyle v. Mayer*, 46 F. App'x 340 (6th Cir. 2002) (unpub.). Yet *Boyle* is not properly part of the pre-*Dotson* circuit split, as

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Three years later, however, this Court rejected the states' efforts to extend *Heck's* exception to a prisoner's "underlying motives" for bringing suit. A circuit split had emerged over whether *Heck* barred a §1983 suit that challenged the constitutionality of parole procedures and sought new, properly-conducted proceedings, but did not ask that the result of the parole hearing, *i.e.*, the denial of parole, be overturned. After granting *certiorari* in one such case, the Court concluded that the prisoner-respondents' §1983 suits were allowable because "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s].'" *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (quoting *Heck*, 512 U.S. at 487 (alteration in *Dotson*)). Rather, success for these prisoners would mean, at most, reconsideration of their parole eligibility or a new parole hearing. *See id.* Accordingly, because these procedural changes would not "necessarily spell speedier release" from prison, the prisoners' §1983 suits were not barred by *Heck*. *Id.*

Notably, the *Dotson* Court specifically considered and rejected the State's contention that the suits were barred "because [the prisoners] believe[d] that victory

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the Sixth Circuit has recently made clear that the case "has no binding precedential value" and that the *Heck* issue remains open. *In re Smith*, No. 07-1502 (6th Cir. Dec. 10, 2007) (available at http://pacer.psc.uscourts.gov) (citing post-*Dotson* circuit cases, and appointing counsel to brief the *Heck* issue anew on behalf of *pro se* petitioner).

on their claims will lead to speedier release from prison," 544 U.S. at 78, explaining that the prisoners' underlying motive for seeking reform to the parole procedures was irrelevant under the functional analysis required by *Heck*. *See id.*

Every Circuit to consider the issue since *Dotson* has concluded that *Heck* is no bar to a prisoner's §1983 action in which the relief sought is limited to DNA access, and has recognized *Dotson* as controlling on this point. Most recently, in *McKithen v. Brown*, 481 F.3d 89, 103 n.15 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1218 (2008), the Second Circuit joined this "emerging consensus" among the post-*Dotson* courts, and noted that the state's central *Preiser-Heck* objection based (as here) on a petitioner's ultimate purpose in bringing suit was decisively "laid to rest by the Supreme Court in *Dotson*." (Troublingly, petitioners do not even mention – much less distinguish – *McKithen*.) *See also Osborne I*, Pet. App. 59a (citing and adopting the reasoning of Eleventh Circuit in *Bradley* and Judge Luttig's opinion in *Harvey II*, and finding that "[a]ny remaining doubt about the propriety of this approach is removed . . . by the Court's recent opinion in *Dotson*"); *Savory v. Lyons*, 469 F.3d 667, 671-72 (7th Cir. 2006) (applying *Dotson's* "narrow" interpretation of *Preiser-Heck* bar to find DNA-access suit cognizable).

This post-*Dotson* unanimity is unsurprising, not only because of *Dotson's* analogous context, plain language, and reasoning, but also because in the *Dotson* proceedings, the State defendants and their

amici expressly recognized that the Court's resolution of that case would likely also settle the split that had emerged in the circuits' three DNA-access cases to date.[21]

The Fourth and Fifth Circuits have not yet considered the impact of *Dotson* on their earlier decisions in *Harvey I* or *Kutzner*. But in light of *Dotson*'s express rejection of the "underlying motives" rationale upon which those cases were based, there is no reason to suspect that they will adhere to their prior decisions, if and when they are asked to do so.

The instant petition makes only cursory mention of *Dotson*, and fails to acknowledge its impact on the DNA access cases to date (asserting only, and with no external support, that *Dotson* "does not conflict" with the prior rulings of the Fourth and Fifth Circuits).

---

[21] In seeking certiorari, the petitioners in *Dotson* argued that, by clarifying the scope of *Heck*, the Court would not only resolve the parole-hearing split at issue but also provide guidance on the DNA-evidence split in the circuits. *See* Pet. 27-28, *Wilkinson v. Dotson*, No. 03-287 (Aug. 18, 2003). A group of sixteen state *amici* also urged the Court to grant certiorari to resolve "lingering questions" regarding the scope of *Heck*, including the split between *Bradley* and the Fourth Circuit's decision in *Harvey I*. States of Alabama, et al., Amicus in Support of Certiorari Pet. 2, 4-7, 11, *Wilkinson v. Dotson*, No. 03-287 (Sept. 22, 2003). At the merits stage, *amici* also cited the overlap between the *Dotson* question and the DNA question. States of Alabama, et al., Amicus Br. 7-8 n.1, *Wilkinson v. Dotson*, No. 03-287 (July 19, 2004) (urging Court to adopt *Harvey I*'s reasoning and find that any suit is barred by *Heck* if brought "as the first step toward" gaining earlier release).

See Pet. 16. Clearly, petitioners' attempt to reanimate a no-longer-active split is unworthy of *certiorari*.

B. There Is No Active Circuit Split as to Whether the Due Process Clause May Require Access to DNA Evidence

Petitioners similarly overstate their claim of a circuit split on the substantive constitutional issue, *i.e.*, whether it may ever be appropriate to apply the Due Process Clause to overcome a State's refusal to permit a convicted person access to DNA testing, at his own expense, for the purpose of establishing his innocence of the crime for which he is incarcerated. It is true that Judge Brunetti's opinion here marks the first in which a circuit court has held that an individual plaintiff has met the demanding showing required in such cases and ordered the evidence be released for DNA testing. But the other three circuits to consider similar applications thus far (the Fourth, Sixth, and Eleventh) have by no means foreclosed that same result in their own jurisdictions. Indeed, their fact-bound, expressly limited decisions belie petitioners' claim of an active circuit split, much less one that requires immediate resolution by this Court.

In the first of these cases, *Harvey v. Horan*, a panel of the Fourth Circuit reversed a Virginia district court's finding that the Due Process clause prevented the State from denying post-conviction DNA testing to the plaintiff (a prisoner convicted of rape at a time when DNA analysis was unavailable),

where such testing could be conducted at no cost to the State and had the scientific potential to yield material, exculpatory evidence in his favor. *See Harvey I*, 278 F.3d at 378-79. In a section of the opinion that was arguably *dicta* (the *Harvey I* panel had already found the entire §1983 action was barred under *Heck*, *see id.* at 375), the panel pronounced itself "not persuaded" by the claim on which Harvey had prevailed in the district court – namely, that *Brady* and its progeny precluded a State from denying access to potentially exculpatory DNA testing after conviction. *Id.* at 378-79.

Harvey sought rehearing *en banc* on both issues. While his *en banc* petition was pending, however, he secured – under Virginia's then newly-enacted post-conviction DNA testing statute – the very relief he sought in his §1983 action (an order for DNA testing), thereby mooting the underlying controversy. *See Harvey II* at 298. The intervening state court action rendered the panel's decision unreviewable by the full Fourth Circuit. *Id.* at 298, 325. Notably, however, Judge Luttig, who had not been a member of the original panel, wrote separately and at length to express the view that, were it not for the intervening state court resolution, he would have urged the full court to rehear the case and to recognize, "at least in limited circumstances," a fundamental constitutional right of access to post-conviction DNA testing:

> [A]t least where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any

> doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence. And it does so out of recognition of the same systemic interests in fairness and ultimate truth.

Id. at 315, 317 (Luttig, J., respecting the denial of rehearing *en banc*).

Judge Luttig's opinion in *Harvey II* has proved influential outside the Fourth Circuit, further belying petitioners' claim that the Circuits have meaningfully split on the fundamental legal questions presented. For example, in the second of the three cases cited by petitioners as evincing this alleged split, *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006), *cert. denied*, 474 U.S. 865 (2007), the Eleventh Circuit denied a request by the petitioner, a death-sentenced inmate facing impending execution, to conduct DNA testing on evidence from his 1982 capital murder conviction. The Court rested its denial, however, on two fact-bound conclusions specific to Grayson's individual bid for DNA testing: first, that his claim of actual innocence was newly-asserted and inconsistent with his own trial testimony (in which he admitted being present at and participating in the crime, but offered an intoxication defense), and second, that even if the hypothesized DNA test results were exclusionary, Grayson would still be guilty of capital murder as a

co-participant. *See id.* at 1339, 1342. The Eleventh Circuit expressly left open the legal question of whether the Due Process Clause might, in an appropriate case, be applied to require the state to provide a petitioner with access to post-conviction DNA testing:

> Today we need not and do not decide whether there can *ever* be a post-conviction right of access to the type of biological evidence Grayson seeks for DNA testing. Rather, we simply conclude that under the particular circumstances of this case, Grayson cannot show such an entitlement. . . .
>
> Our decision here in no way demeans the value of DNA testing or suggests that it should not be made available post-conviction; it simply holds that Grayson has asserted no constitutional right to it under the factual circumstances of the case.

Id. at 1342-43 (emphasis in original). Indeed, the Eleventh Circuit favorably cited Judge Luttig's *Harvey II* analysis as to when the Due Process Clause should be read to require post-conviction DNA access, noting that "Grayson's case does not fall into the limited class of cases described" in that opinion. *Id.* at 1342. Finally, were there any doubt that *Grayson* left the issue open, two subsequent Eleventh Circuit §1983 DNA-access cases since *Grayson* have made that clear. *See Arthur v. King*, 500 F.3d 1335, 1339 (11th Cir. 2007) (emphasizing that "[i]n *Grayson*, we [denied DNA testing] under the factual circumstances

of the case, but left open the possibility that another §1983 plaintiff might prevail," and proceeding to deny plaintiff Arthur's claim for testing without reaching constitutional issue); *Thompson v. McCullum*, 253 F. App'x 11, 2007 WL 3171330 (11th Cir. Oct. 31, 2007) (same, in *pro se* prisoner's §1983 suit).

Nor does the third and final case cited by petitioners on this issue establish the professed split. *See* Pet. 19 (citing *Alley v. Key*, 2006 WL 1313364 (6th Cir. May 14, 2006), *cert. denied*, 548 U.S. 921 (2006)). *Alley* was not only an unpublished, two-page decision by the Sixth Circuit denying relief to a death row inmate on the eve of his execution, but one in which the panel took pains to emphasize its limited precedential effect. *See id.* at *1 ("Though this case and its expedited briefing schedule *do not encourage a definitive resolution on all aspects of the matter*, we agree, *for purposes of the dispute now before us*, with the district court's ruling that there exists no general constitutional right to post-judgment DNA testing."); *id.* at *2 ("*Brady* cannot be said to reach post-conviction access for DNA testing *in the circumstances presented by the case before us.*") (emphasis supplied). *Alley*'s limited scope has further been evidenced by the fact that it has been cited in only one such ruling by its sister circuits, and only in a two-sentence footnote. *See Grayson*, 460 F.3d at 1339 n.7.

In sum, then, petitioners' alleged "split in the circuits" on the due process issue consists of one case in the Fourth Circuit whose underlying dispute was

mooted while the *en banc* petition was pending; a case in the Eleventh Circuit that was denied on its facts and expressly left open the underlying constitutional issue; and an unpublished Sixth Circuit ruling that emphasized its fact-bound, limited scope.

III. The Decision Below Was Correct

The Ninth Circuit appropriately applied the basic protections of the Due Process Clause to permit Osborne one simple form of injunctive relief: release of the very items of forensic evidence used by the State to secure his conviction for previously-unavailable DNA testing. The court's determination that where, as here, such testing will be performed at no cost to the State, and can provide scientifically-unassailable evidence that might not only be material to a convicted person's claim of innocence, but may conclusively establish his actual innocence beyond any doubt, falls within the core of this Court's long-standing recognition of the Due Process Clause's guarantees. *See, e.g.*, *California v. Trombetta*, 467 U.S. 479, 485 (1984) (discussing line of cases regarding "constitutionally guaranteed access to evidence," which derive from the twin constitutional imperatives of "protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system"); *Harvey II*, *supra*, 285 F.3d at 315, 320 (Luttig, J.) ("A right of access to evidence for tests which, given the particular crime for which the individual was convicted and the evidence that was offered by the government at trial in support of the

defendant's guilt, could prove beyond any doubt that the individual in fact did not commit the crime, is constitutionally required, I believe, as a matter of basic fairness. . . . That the Constitution should recognize a limited right of access to previously-produced forensic evidence should be unsurprising.") (internal citations omitted).

Indeed, Judge Brunetti's opinion was apparently so persuasive in its application of these principles to the facts of Osborne's case as to lead petitioners to now abandon their earlier contention that the requested DNA testing does not have the potential to conclusively prove Osborne's actual innocence – other than to note (in an aside that further complicates the legal issues raised, and would make this case particularly inappropriate for *certiorari*) that his request to conduct STR-DNA testing differs from the "strategic" choice made by his appointed attorney at trial to forgo an earlier form of DNA re-testing.[22]

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[22] *See* Pet. 4-5 (noting that in post-conviction proceedings, Osborne's trial attorney attested that after the state's testing indicated that Osborne was among one out of six persons in the general population who shared the DQ-Alpha DNA profile in the semen from the condom, she decided not to pursue potentially more discriminating RFLP-DNA testing for fear that the results might inculpate him). To the extent petitioners believe this fact is important, it would seem to make this case a poor vehicle for resolving the broader constitutional questions at issue – inasmuch as this Court would not only need to consider whether the Due Process Clause may preclude the state from barring access to potentially exculpatory DNA testing after conviction, but also whether a convicted person may be said to waive that right by

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Nor is there any merit to petitioners' claim that the decision has created "a litigation-style discovery right" with a "potentially enormous impact on the states." Pet. 10, 25. The court carefully limited its holding to a narrow and highly specific class of post-conviction cases, like Osborne's, in which the nexus between the DNA evidence to be tested, the petitioner's trial, and his ultimate claim for post-conviction relief are plain. *See* Pet. App. 44a. More fundamentally, the simple, ministerial act that a State is required to perform when a plaintiff prevails – transferring the forensic evidence in its possession to a DNA laboratory – is hardly akin to the burdens of civil "discovery." As Judge Brunetti aptly noted, "[t]he evidence can be produced easily and without cost to

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reason of his trial attorney's claim that she made a strategic decision to forgo an earlier form of DNA re-testing (one which, moreover, is no longer in use, and which the state concedes is less advanced than the current STR-DNA methods, *see* Pet. App. 5a n.2). Small as the class of persons who were convicted before the advent of DNA testing and now seek it through Section 1983 actions may be, even smaller still is the sub-class of persons who, like Osborne, were convicted in this small historical window amidst the technology's evolution. Moreover, if his STR-DNA testing does prove exculpatory, Osborne will not be the first convicted person to be exonerated after an attorney did not pursue DNA testing for "strategic" reasons that were based on incorrect assumptions about a client's probable guilt. *See Toney v. Gammon*, 79 F.3d 693 (8th Cir. 1996) (granting DNA testing for purpose of establishing habeas petitioner's claim that trial counsel was ineffective for failing to pursue DNA testing at his rape trial); Samuel R. Gross et al., *Exonerations in the United States, 1989-2003*, 95 J. Crim. L. & Criminology 523, 558 (Winter 2005) (Toney exonerated by DNA testing).

the state," and it is only petitioners' "simple refusal to open the evidence locker" that has occasioned these last six years of litigation. Pet. App. 42a-43a. Indeed, that this ruling will not unduly burden the states is made clear by the fact that nearly every state in the nation has already undertaken to impose a similar obligation *on itself* – recognizing, in enacting their post-conviction DNA testing statutes, that the profound benefits to the justice system far outweigh the minimal "burdens" these laws may require to be implemented. And as noted *supra*, many of these states' own laws (in original or amended form) go well beyond the no-cost relief Osborne seeks here, providing, *inter alia*, for the appointment of counsel and state-funded DNA tests for indigent petitioners.

Petitioners' claim that the decision below rests on a faulty premise – that "freestanding" actual innocence claims are cognizable under the United States Constitution, *see Herrera v. Collins*, 506 U.S. 390 (1993) – also cannot withstand scrutiny. First, the Ninth Circuit was careful to note that this Court expressly declined to resolve the issue in *Herrera* and, most recently, in *House v. Bell*, 547 U.S. 518, 554-55 (2006) – and its own decision in no way purported to step into the breach. *See* Pet. App. 21a ("In resolving the instant appeal, we need not decide the open questions surrounding freestanding innocence claims."). For even if such claims were not cognizable, if the post-conviction DNA tests Osborne seeks do in fact provide conclusive proof of his innocence, he has numerous other routes to obtain relief. These

include, among others, a post-conviction relief petition based on newly discovered evidence under Alaska law; a federal habeas petition asserting a "gateway" claim of actual innocence, to permit the consideration of otherwise-barred constitutional claims (such as ineffective assistance of trial counsel); and/or a petition for executive clemency.[23] Accordingly, petitioners' assertion that the panel opinion constitutes a "split" with as many as nine of its sister circuits on the *Herrera* issue (*see* Pet. 21-22) not only badly mischaracterizes the opinion itself, but is, post-*House*, also a highly disingenuous citation to these other courts' opinions.[24]

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[23] *See* Pet. App. 19a, 42a, 44a n.4. Indeed, as DNA test results of the sort outlined by Judge Brunetti would constitute new evidence of actual innocence, Osborne's claim would fall squarely within Alaska's existing statutory vehicles for post-conviction relief. *See* Alaska Stat. §12.72.010(4) (petitions authorized where there exists "evidence of material facts, not previously present and heard by the court, that requires vacation of the conviction or sentence in the interest of justice"); *see also* Alaska Stat. §12.72.020 (excusing procedural bars where due diligence yields new evidence that "establishes by clear and convincing evidence that the applicant is innocent"); Alaska Stat. §33.20.070 (giving governor broad authority to grant "pardons, commutations of sentence, and reprieves").

[24] Prior to *House*, which made clear that *Herrera* did not decide whether a freestanding actual innocence claim can ever be cognizable, *see House*, 547 U.S. at 554-55 ("*House* urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one. We decline to resolve this issue."), some state and federal courts had read *Herrera* to foreclose that possibility. Eight of the nine cases cited by

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As members of this Court have noted, given the extraordinarily high factual showing that would necessarily be required for a petitioner to prevail on a *Herrera*-type claim, this Court may never have cause to address the underlying legal question of whether such claims are cognizable.[25] Were this Court so inclined, however, this case's current posture makes it a singularly poor vehicle for doing so. The question whether such claims are cognizable on habeas is surely one that is properly resolved on habeas, *i.e.*, when a habeas petitioner asserts that he has sufficient proof of innocence to warrant a federal court to overturn his conviction on that basis alone. Osborne has filed no such petition, and makes no such claim; he readily concedes that doing so (whether in state or federal court, or in a clemency petition) without benefit of exculpatory DNA test results would be futile. But as the court below observed, by refusing to allow DNA testing yet asking the federal courts to peremptorily deny his hypothetical, not-yet-ripe

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petitioners as concluding "that a freestanding innocence claim is not cognizable" pursuant to *Herrera* predates *House*'s plain statement to the contrary; the ninth, *Foster v. Quarterman*, 466 F.3d 359 (5th Cir. 2006) acknowledges *House*'s impact, but determines that under Fifth Circuit rules it must consider itself bound by the opinion of a pre-*House* decision by another panel within the Circuit.

[25] *See Herrera*, 506 U.S. at 428 (Scalia and Thomas, JJ., concurring) ("With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.").

innocence claim, it is *petitioners* who are asking the federal courts to prematurely reach this constitutional issue, rather than simply "allow[ing] the objective facts to come to light so that Osborne can actually file his actual innocence claim and support it with hard evidence." Pet. App. 27a. Indeed, given the myriad ways that DNA testing could establish Osborne's innocence beyond any doubt (including, *inter alia*, providing scientific proof not only that Osborne was not the rapist, but identifying the actual assailant through the convicted-offender DNA databank), once the DNA results are in hand, the State could well consent to relief, thereby obviating the need for Osborne to file a habeas petition at all.[26] Similarly, no grounds for further litigation would exist if the results prove inculpatory or inconclusive. Thus, it is only if and when (a) DNA testing is conducted, with exculpatory results, (b) despite exculpatory DNA

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[26] This result is not uncommon in the post-DNA era – even in cases where, as here, the State had previously opposed the DNA testing that it later conceded was exculpatory. *See, e.g.*, *Warney v. City of Rochester*, 536 F. Supp. 2d 285, 289-90 (W.D.N.Y. 2008) (describing DNA testing that led to prosecutors' application to vacate murder conviction of Douglas Warney, after tests yielded on blood stains from crime scene led to databank hit on real perpetrator, a man with history of similar offenses who confessed that he committed the murder alone and had no connection to Warney). As of June 2008, there were over 6 million convicted-offender DNA profiles in the CODIS database, and the system had produced over 71,500 DNA "hits" in criminal investigations nationally. *See* Federal Bureau of Investigation, *CODIS/NDIS Statistics*, available at http://www.fbi.gov/hq/lab/codis/clickmap.htm (last visited September 17, 2008).

results, Osborne fails to obtain relief in state court or through clemency, *and* (c) he files a federal habeas petition asserting a freestanding innocence claim, that the State's *Herrera* objection will conceivably be ripe for review.

Lastly, it bears noting that the decision below was narrowly tailored to limit the scope of its due process ruling only to cases that are at least as compelling on their facts as Osborne's. *See* Pet. App. 44a-45a. Conversely, reversal of that holding would not even resolve the instant action with respect to this one individual. The panel's ruling in Osborne's favor made it unnecessary for the court to consider whether DNA access may, in the alternative, be required pursuant to any of the other federal constitutional claims Osborne pled in his complaint (including, *inter alia*, his First and Fourteenth Amendment rights of meaningful access to courts, and his due process right to pursue executive clemency). *See* Pet. App. 44a n.4. Thus, were this Court to reverse the decision below, the case would thereafter be remanded for consideration of Osborne's remaining, substantial constitutional claims.

CONCLUSION

This Court should deny the petition for certiorari.

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REPLY BRIEF

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IN THE

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Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CALLS INTO QUESTION THE VALIDITY OF STATE LAWS AUTHORIZING POSTCONVICTION DNA TESTING

Osborne points with evident satisfaction to the "broad national consensus" reflected in the laws of 43 states that allow some opportunity for postconviction DNA testing. [Opp. 7-8 & n.4] The Ninth Circuit's decision places many of those laws in jeopardy. By creating a broad, virtually unlimited federal due process right, the Ninth Circuit's decision effectively

removes the issue of postconviction DNA testing from the realm of state control and experimentation.

Some states limit the postconviction procedure to defendants convicted of felonies or certain specific felonies or those given a sentence of death.[1] One state bars postconviction DNA testing when a defendant, for tactical reasons, did not seek testing that was available at the time of trial.[2] Those laws now conflict with the constitutional right created by the Ninth Circuit, which applies to all defendants regardless of offense or defense tactics.

And some states have adopted standards more stringent than the Ninth Circuit's standard, which requires a defendant to show only a "reasonable probability that [he] could 'affirmatively prove that he is probably innocent'" if the test result were exculpatory. Pet. App. 24a (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997)). This "reasonable probability" standard is more generous than state laws requiring proof by at least a preponderance of evidence.[3] And some state laws re-

---

[1] *See* Ariz. Rev. Stat. § 13-4240(A); Cal. Penal Code § 1405(a); Colo. Rev. Stat. §§ 18-1-411(4), 18-1-412(1); D.C. Code § 22-4133(a); Fla. Stat. § 925.11(a); Ga. Code § 5-5-41(c)(1); Ind. Code § 35-38-7-1; Iowa Code § 81.10(1); Kan. Stat. §21-2512(a); Ky. Rev. Stat. § 422.285(1); La. Code Crim. Proc. art. 926.1(A)(1); Me. Rev. Stat. § 2137(1); Md. Code, Crim. Proc. § 8-201(b); Mich. Comp. Laws § 770.16(1); Mont. Code § 46-21-110(1); Nev. Rev. Stat. § 176.0918(1); N.M. Stat. § 31-1A-2(A); Ohio Rev. Code § 2953.72(C)(1)(a); Or. Rev. Stat. § 138.690; Tenn. Code § 40-30-303; Utah Code § 78B-9-301(2); Vt. Code § 5561(a), (b)(2); Va. Code § 19.2-327.1(A); Wash. Rev. Code § 10.73.170(1); W. Va. Code § 15-2B-14(a); Wyo. Stat. § 7-12-303(c).

[2] *See* Utah Code § 78B-9-301(4).

[3] *See* Colo. Rev. Stat. §§ 18-1-413(1) (preponderance); Del. Code § 4504(b) (clear and convincing evidence); Idaho Code

quire a defendant to prove that the new evidence would likely establish *actual* innocence.[4] That requirement is more stringent than the Ninth Circuit's standard that the evidence merely establish probable innocence.

As the statutes cited by Osborne demonstrate, states have taken an active interest in the question of postconviction DNA testing. And, like the variations in state laws relating to postconviction relief in general, different states have taken different approaches on this question. The Ninth Circuit has removed this issue from the states through the creation of an entirely new area of federal constitutional law – a broad and as yet unlimited postconviction due process right.

II. THE COURT'S DECISION IN *WILKINSON V. DOTSON* DID NOT RESOLVE THE CIRCUIT SPLIT OVER THE USE OF § 1983 AS A DISCOVERY DEVICE FOR AN INNOCENCE CLAIM

The federal courts of appeals are split on whether a postconviction access-to-evidence claim can be brought under § 1983. [*See* Pet. 12-13] Osborne

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§ 19-4902(d)(1) (preponderance); Mont. Code § 46-21-110(1) (same); N.M. Stat. § 31-1A-2(C) (same); Tex. Code Crim. Proc. art. 64.03(a)(2) (same); Wash. Rev. Stat. § 10.73.170(3) (same).

[4] *See* Colo. Rev. Stat. §§ 18-1-411(1), 18-1-413(1)(a) (actual innocence, i.e., clear and convincing evidence that no reasonable trier of fact would have convicted); Del. Code § 4504(b) (no reasonable trier of fact would have convicted); Ohio Rev. Code §§ 2953.71(L), 2953.74(C)(5) ("strong probability" that no reasonable factfinder would have convicted); Or. Rev. Stat. § 138.692(2)(d) (actual innocence); Pa. Cons. Stat. § 9543.1(c)(3)(ii), (d) (same); Wyo. Stat. § 7-12-303(c)(ix) (same).

asserts that *Wilkinson v. Dotson*, 544 U.S. 74 (2005), resolves that split. He posits a simple syllogism: (1) pre-*Dotson* cases rejecting a § 1983 access-to-evidence claim focused primarily on the prisoner's motive rather than the relief sought; (2) *Dotson* rejected motive as a basis for determining whether a claim can be asserted under § 1983; and (3) the cases based on motive are no longer good law post-*Dotson*, thereby eliminating the pre-*Dotson* split. [Opp. 17-22] But Osborne's assertion hinges, first, on a mischaracterization of the reasoning in cases rejecting a § 1983 access-to-evidence claim and, second, on a mischaracterization of *Dotson*.

Osborne's argument depends first on his mischaracterization of *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), and similar cases refusing to recognize a § 1983 access-to-evidence claim. Osborne alleges that those cases focus solely on the prisoner's underlying intent to use the evidence sought to challenge a conviction. [Opp. 18] The crucial fact in *Harvey* was not the prisoner's motive in seeking access to the DNA evidence, i.e., to challenge his conviction. Rather, the key point was that completely exonerative results from retesting that evidence would "necessarily impl[y] the invalidity of his conviction." *Id.* at 375 (citing *Edwards v. Balisok*, 520 U.S. 641, 648-49 (1997)). The *Harvey* court noted the inconsistency between the prisoner's stated intent and his attempt to downplay the exonerating potential of new DNA testing. *Harvey*, 278 F.3d at 375. But the court's reasoning and the end result would have been the same regardless of the prisoner's intent because new test results had the potential effect of invalidating his conviction.

Osborne's second proposition – that *Dotson* changed existing law by rejecting motive as a consideration – also fails. *Dotson* traced the development of the distinction between habeas claims and § 1983 claims from its roots in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), though its application in *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards*, 520 U.S. 641 (1997). The Court concluded that "these cases, taken together," establish principles that bar a state prisoner's § 1983 action "*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 544 U.S. at 81-82. The Court then stated that it was "[a]pplying these principles," to a new factual context – prisoners' challenges to parole procedures. *Id.* at 82. Nothing in *Dotson* indicates that the Court applied new or different principles or moved the line established by those principles that separates § 1983 claims from habeas claims.

Osborne's focus on the *Dotson* Court's rejection of Ohio's motive-based argument all but ignores the context and thereby the point of the Court's discussion of motive. [Opp. 19-20] *Dotson* focused on the tenuous connection between (1) the prisoners' claims that the state parole procedures were unconstitutional and (2) the possibility of the prisoners' release. The Court explained that its focus was and has always been "on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement" even when they seek to do so "*indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Dotson*, 544 U.S. at 81. The *Dotson* prisoners could proceed under § 1983 because a judgment

favoring the prisoners would not necessarily imply the unlawfulness of the state's custody; the state could still reject their parole applications even if new parole hearings were required as a result of their § 1983 actions. *Id.* at 82.

The *Dotson* Court thus concluded that the relationship between the prisoners' claims and release from confinement was "too tenuous" to require that the claims be brought only through habeas. *Dotson*, 544 U.S. at 78. In reaching this conclusion, the Court rejected the use of motive or intent to provide the missing link. But while Osborne may be correct that motive is irrelevant, this is not a startling proposition, nor does *Dotson*'s statement of that proposition signal a departure from prior case law. Most important, it has no relevance to the state's argument in this case. The state's argument hinges not on Osborne's motive but on the close connection between his claim – access to potentially exculpatory evidence – and the validity of his conviction.

In fact, Osborne's access-to-evidence claim harkens back to the § 1983 damages claim rejected in *Heck*, 512 U.S. 477. The prisoner in *Heck* sought only damages for what was essentially a claim for malicious prosecution. Proof of the invalidity of his conviction was, however, a necessary element of his damages claim even though he did not ask that the conviction be overturned. Thus, if the prisoner successfully proved his damages claim under § 1983, the resulting judgment "would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. A § 1983 claim seeking access to DNA evidence carries a similar implication.

The Ninth Circuit confirmed the close, significant, and direct relationship between the evidence Osborne

seeks and the potential impact of that evidence on the validity of his conviction. The court concluded that the DNA evidence is material because, with that evidence, "Osborne could 'affirmatively prove that he is probably innocent,'" and without it, he would likely be unable to "receive a fair habeas hearing." Pet. App. 28a (quoting *Carriger*, 132 F.3d at 476). In fact, from the Ninth Circuit's perspective, the possibility that the DNA evidence would exonerate Osborne – and thus impliedly invalidate his conviction – was an element of Osborne's proof in establishing his right to access to that evidence. Pet. App. 28a.

Osborne's purpose (to use the DNA test results to challenge his conviction) merely highlights the close connection between his current claim and the potential invalidation of his conviction. That close connection precludes Osborne's reliance on a § 1983 action regardless of what he ultimately does with those results.

III. OSBORNE'S DEFENSE OF THE NINTH CIRCUIT'S DECISION IS NOT FULLY RESPONSIVE TO THE STATE'S ARGUMENT

Part III of Osborne's opposition, titled "The Decision Below Was Correct," initially argues that the Ninth Circuit correctly found a due process right to post-conviction access to the DNA evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. [*See* Opp. 27-28] But this does not fully respond to the state's argument that the recognition of this right for the express purpose of proving actual innocence amounts to a recognition of a federal due process right to seek invalidation of a state conviction on actual-innocence grounds. [*See* Pet. 19 ff.] The Ninth Circuit implicitly acknowledged this by relying on

"the well-established assumption that [Osborne's] freestanding innocence claim will be cognizable in federal court." Pet. App. 22a. That assumption has been rejected in nine other circuits and has not yet been accepted by this Court. [Pet. 21-22]

Little legal justification exists for granting post-conviction access to evidence *independent* of an postconviction actual innocence claim. Recognizing that access-to-evidence claims like Osborne's are nothing more than discovery requests and requiring that they be asserted within the procedural confines of a pending substantive claim results in the application of established parameters on the scope and manner of disclosure and avoids collateral issues, such as preservation-of-evidence requirements or who pays for testing. Requiring that access claims be asserted in the context of a substantive claim for relief is actually more consistent with *Brady* and its progeny, which apply in the context of a pending prosecution, than the creation of a right of access independent of any substantive claim.

Osborne also uses this last section of his opposition to make other points unrelated to the correctness of the Ninth Circuit's decision. One of those is his suggestion that the state now concedes the exculpatory potential of the DNA evidence he seeks. [*See* Opp. 28 & n.22] Further explanation of this concession is necessary. Only one of the possible results from retesting would conclusively establish Osborne's innocence: a retest of the semen inside the condom would have to overwhelmingly exclude Osborne as the donor *and* testing of the epithelial cells on the outside of the condom would have to overwhelmingly include K.G. as the donor; *only then* could Osborne

say that the results conclusively establish his innocence.

But if the epithelial cells cannot be linked to K.G., then the exclusion of Osborne as the source of the semen would not establish his innocence. Unless some third person were identified who then confessed to the rape, this result would raise the distinct possibility that the blue condom found by the police was not the one actually used in the rape.

The Ninth Circuit disparaged this possibility as fantastic in light of the state's trial theory based on the condom. Pet. App. 34a (noting that state's "newly imagined alternative theories" rebut its trial evidence). The court ignored that new test results that excluded (but did not exonerate) Osborne would compel the state to argue that the found condom was not the rape condom; the police simply stopped looking through the snow, assuming that the condom they found was used in the rape. Apart from the DQ-alpha test, which established a 1-in-6 chance that Osborne had used the condom, only its color and location tied the condom to the rape. Osborne might not have disposed of the condom at the scene or the epithelial cells on the outside might not be K.G.'s; in either case that would mean that the evidence condom could not be the rape condom. Thus, absent evidence linking the epithelial cells to K.G., new testing excluding Osborne as the source of the semen would not establish his innocence. And if Osborne were entitled to a new trial based on a new test result that excluded him, the fact-finder would have to determine whether the found condom was indeed used in the rape. And that same fact-finder would also be able to consider Osborne's written and oral confessions to the parole board.

Osborne also mentions the state's brief description of his lawyer's pretrial strategic decision to forgo RFLP DNA testing, a more discriminating method than the DQ-alpha test done by the state.[5] [*See* Opp. 28 & n.22 (citing Pet. 4-5)] Osborne asserts that this pretrial decision "further complicates the legal issues raised [in the petition], and would make this particularly inappropriate for *certiorari*," but he does not explain how this would be so. [Opp. 28 (citing Pet. 4-5)] Osborne's pretrial decision played no role in the Ninth Circuit's decision and is not relied on by the state in support of its petition. Thus the pretrial decision should not be viewed as having any effect on the Court's consideration of this case.

Osborne also emphasizes his willingness to bear the cost of retesting, but that is legally immaterial. [Opp. 1, 27, 30] The ability or willingness to pay is irrelevant in the context of rights under the Due Process Clause, particularly those that relate to the criminal justice process. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that criminal defendant may not be denied lawyer on account of indigency).

Osborne also challenges as "faulty" the state's assertion that the Ninth Circuit's decision rested on the incorrect assumption that freestanding innocence claims were cognizable, noting that this Court has not yet resolved the cognizability of those claims. [Opp. 30 ff. (referring to Pet. 19)] Osborne ignores

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[5] The state included this description for its historical relevance: the Alaska Court of Appeals affirmed the denial of Osborne's postconviction relief application based on the decision by Osborne's lawyer to forgo RFLP testing. *See* Pet. App. 97a-102a.

the plain language of the Ninth Circuit's decision: "In this circuit *we . . . have assumed that freestanding innocence claims are possible.*" Pet. App. 20a (citing *Carriger*, 132 F.3d at 476) (emphasis added). Though acknowledging the unresolved status of freestanding innocence claims, the court reiterated, "[W]e assume for the sake of argument that such claims are cognizable in federal habeas proceedings in both capital and non-capital cases." *Id.* at 21a. Osborne cannot escape this explicit assumption or its central role in the Ninth Circuit's holding by relying on the unsettled status of freestanding innocence claims.

In addition, Osborne takes issue with the state's argument that the Ninth Circuit's assumption of the cognizability in federal courts of freestanding innocence claims is at odds with decisions by the courts of appeals of nine other circuits. [Opp. 31-32 (referring to Pet. 21-22)] Osborne claims that the state's reliance on those decisions is "disingenuous" because they were (1) based on *Herrera v. Collins*, 506 U.S. 390 (1993), which left open the cognizability issue, and (2) decided before *House v. Bell*, 547 U.S. 518 (2006), which expressly refused to decide the issue. [*Id.* at 31 & n.24] Osborne ignores the state's acknowledgement that the Court had not resolved the cognizability issue. [*See* Pet. 20-21]

More important, the fact that this Court has not decided the issue does not preclude the circuit courts from doing so or dilute the precedential value of the decisions by the circuits that have done so. The fact remains that, irrespective of the Court's refusal to decide the issue, the law in nine circuits is that freestanding innocence claims are not cognizable in federal court, while the Ninth Circuit has not only assumed that they are cognizable but has also

created a new, independent postconviction right of access to evidence based on that assumption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 17, 2008

JOINT APPENDIX

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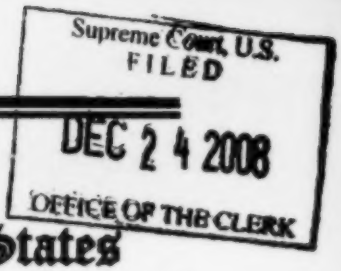

IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 27, 2008

CERTIORARI GRANTED NOVEMBER 3, 2008

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Opinion of the Alaska Court of Appeals, *Osborne v. State*, dated April 15, 2005 ..... 91a

Opinion of the United States Court of Appeals for the Ninth Circuit, entered on September 8, 2005 ..... 51a

Order of the United States District Court for the District of Alaska, Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment, dated August 3, 2006 ..... 46a

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Opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 2, 2008 ..... 1a

RELEVANT DOCKET ENTRIES
U.S. District Court
District of Alaska (Anchorage)
CIVIL DOCKET FOR CASE #: A03-0118 CV (RRB)/
3:03-cv-00118-RRB
Osborne
v.
District Attorney's Office for the
Third Judicial District et al.

Date Filed	#	Docket Text
6/03/03	1	Complaint filed w/att exhs; Summons issued.
6/25/03	13	DEF 1-2 Answer to Complaint.
8/08/03	18	DEF 3-4 Answer to Complaint.
11/06/03	34	DEF 3-4 motion to dismiss w/att memo.
11/17/03	37	DEF 1-2 motion to dismiss w/att exh.
12/02/03	41	PLF 1 opposition to DEF 3-4 motion to dismiss (34-1), DEF 1-2 motion to dismiss (37-1) w/att notice.
12/18/03	53	DEF 3-4 reply to opposition to DEF 3-4 motion to dismiss (34-1).
12/19/03	54	DEF 1-2 reply to opposition to DEF 1-2 motion to dismiss (37-1).
01/07/04	55	Initial R&R re: DEF 3-4 motion to dismiss (34-1). Recommended be granted; Objections due 01/21/04. Reply due 01/30/04. cc: cnsl, Judge Beistline.
01/07/04	55	Initial R&R re: DEF 1-2 motion to dismiss (37-1). Recommended granted;

		Objections due 01/21/04. Reply due 01/30/04. cc: cnsl, Judge Beistline.
01/20/04	56	PLF 1 objection to R&R re: DEF 3-4 motion to dismiss (34-1), DEF 1-2 motion to dismiss (37-1).
01/20/04	57	PLF 1 Request for Oral Argument re: DEF 3-4 motion to dismiss (34-1), DEF 1-2 motion to dismiss (37-1).
01/21/04	58	DEF 1-2 objection to portion of the R&R re: DEF 1-2 motion to dismiss (37-1).
01/26/04	59	DEF 1-2 oppo to pltf's request for O/A re DEF 1-2 motion to dismiss (37-1).
01/26/04	60	DEF 1-2 reply to objection to R&R re: DEF 1-2 motion to dismiss (37-1).
01/28/04	61	Final R&R re: DEF 3-4 motion to dismiss (34-1), DEF 1-2 motion to dismiss (37-1); MJ declines to modify recommendation that motions to dismiss be GRANTED and pltf's request for O/A (57-1) is denied. cc: cnsl, Judge Beistline.
01/29/04	62	RRB Minute Order granting motion to dismiss (34-1), motion to dismiss (37-1). Plf's complaint is dismissed for failing to state a claim upon which relief can be granted. cc: cnsl
01/30/04	63	RRB Judgment that plf's cmplt is dism for failure to state a claim upon which relief can be granted. cc: cnsl, MJ Roberts, O&J 11641.

02/10/04	64	PLF 1 appeal to 9CCA of (63-1) filed 01/30/04. cc:cnsl, Judge Beistline, 9CCA.
11/16/05	76	MOTION for Summary Judgment by William G. Osborne. (PLD) (Entered: 12/08/2005).
02/17/06	87	First MOTION to Stay *Proceedings* by Anchorage Police Department, Walter Monegan, District Attorneys Office for the Third Judicial District, Susan A. Parkes. (Attachments: # 1 Proposed Order Granting Stay) (Simel, Nancy) (Entered: 02/17/2006).
02/17/06	88	MEMORANDUM *In Support Of Motion To Stay Proceedings* by Anchorage Police Department, Walter Monegan, District Attorneys Office for the Third Judicial District, Susan A. Parkes 87 First MOTION to Stay *Proceedings* filed by Anchorage Police Department,, Walter Monegan,, District Attorneys Office for the Third Judicial District,, Susan A. Parkes,. (Attachments: # 1 Attachment A) (Simel, Nancy) (Entered: 02/17/2006).
02/17/06	89	RESPONSE in Opposition re 76 MOTION for Summary Judgment filed by Anchorage Police Department, Walter Monegan, District Attorneys Office for the Third Judicial District, Susan A. Parkes. (Attachments: # 1 Proposed Order) (Simel, Nancy) (Entered: 02/17/2006).

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03/13/06	94	REPLY to Response to Motion re 76 MOTION for Summary Judgment filed by William G. Osborne. (Bundy, Robert) (Entered: 03/13/2006).
03/22/06	97	RESPONSE in Opposition re 87 First MOTION to Stay *Proceedings* filed by William G. Osborne. (Bundy, Robert) (Entered: 03/22/2006).
03/28/06	99	REPLY to Response to Motion re 87 First MOTION to Stay *Proceedings* filed by District Attorneys Office for the Third Judicial District, Susan A. Parkes. (Simel, Nancy) (Entered: 03/28/2006).
04/25/06	103	ORDER denying 87 Motion to Stay. (JPS,) (Entered: 04/25/2006).
05/17/06	107	Cross MOTION for Summary Judgment by District Attorneys Office for

the Third Judicial District, Susan A. Parkes. (Attachments: # 1 Proposed Order) (Simel, Nancy) (Entered: 05/17/2006).

05/17/06 108 MEMORANDUM *in Support of Cross Motion for Summary Judgment* by District Attorneys Office for the Third Judicial District, Susan A. Parkes 107 Cross MOTION for Summary Judgment filed by District Attorneys Office for the Third Judicial District,, Susan A. Parkes,. (Attachments: # 1 Exhibit A)(Simel, Nancy) (Entered: 05/17/2006).

06/05/06 111 RESPONSE in Opposition re 107 Cross MOTION for Summary Judgment filed by William G. Osborne. (Bundy, Robert) (Entered: 06/05/2006).

06/07/06 112 NOTICE *OF FILING OSBORNE'S AFFIDAVIT* by Randall S. Cavanaugh on behalf of William G. Osborne (Attachments: # 1 Affidavit) (Cavanaugh, Randall) (Entered: 06/07/2006).

06/07/06 113 Minute Entry for proceedings held before Judge Ralph R. Beistline: Motion Hearing held on 6/7/2006 re 76 MOTION for Summary Judgment filed by William G. Osborne. Matter taken UNDER ADVISEMENT. Written ruling to issue. (Court Recorder EKS.) Plaintiff Counsel-Randall S. Cavanaugh, Robert C. Bundy, and

Colin Starger; Defense Counsel-Nancy R. Simel; (EKS) (Entered: 06/07/2006).

06/12/06 114 NOTICE *of Additional Authority* by Robert C. Bundy on behalf of William G. Osborne re 76 MOTION for Summary Judgment (Bundy, Robert) (Entered: 06/12/2006).

07/03/06 115 ORDER requesting supplemental briefing. (JPS,) Modified on 7/3/2006 to reflect service by fax on Neufeld and Starger (JPS,). (Entered: 07/03/2006).

07/18/06 116 SUPPLEMENT *re House v. Bell* by District Attorneys Office for the Third Judicial District, Susan A. Parkes 107 Cross MOTION for Summary Judgment filed by District Attorneys Office for the Third Judicial District,, Susan A. Parkes,, 114 Notice (Other) filed by William G. Osborne,, 115 Order. (Simel, Nancy) (Entered: 07/18/2006).

08/03/06 117 ORDER RE SUMMARY JUDGMENT MOTIONS. (JPS,) Modified on 8/3/2006 to reflect service by fax on Neufeld and Starger. (JPS,). (Entered: 08/03/2006).

09/05/06 121 JUDGMENT in favor of Plaintiff against Defendant. The Plaintiff's motion for Summary Judgment (Docket 76) is hereby GRANTED and that the Defendant's Cross Motion for Summary Judgment (Docket 107)

		is hereby Denied.. Signed by Judge Ralph R. Beistline on 09/05/2006. (TJG, COURT STAFF) (Entered: 09/08/2006).
10/05/06	126	NOTICE OF APPEAL by District Attorneys Office for the Third Judicial District, Susan A. Parkes. Filing fee $ 455. (Simel, Nancy) Modified on 11/6/2006 to correct date entry error and delete APD and Monegan as filers of hte Appeal (NKD, COURT STAFF). (Entered: 10/05/2006).

RELEVANT DOCKET ENTRIES

United States Court of Appeals for the Ninth Circuit
Court of Appeals Docket #: 04-35126
William G. Osborne
Plaintiff-Appellant
v.
District Attorney's Office for the Third Judicial District; Susan A. Parkes,
Defendants-Appellees

02/20/04	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 2/20/04; appellee's designation of RT is due 3/1/04„ ; appellant shall order transcript by 3/11/04; court reporter shall file transcript in DC by 4/12/04; certificate of record shall be filed by 4/19/04; appellant's opening brief is due 5/28/04; appellees' brief is due 6/28/04„ ; appellants' reply brief is due 7/12/04; [04-35126]
09/17/04	28	Filed original and 15 copies Appellants opening brief (Informal: NO) 19 pages and five excerpts of record in 2 volumes; served on 9/13/04 [04-35126]
11/08/04	34	Filed aples' stipulaton to dismiss aples: Anchorage Police Dept & Walt Monegan, Anchorage Police Dept Chief of Police as parties to this appeal; [04-35126] served on 11/3/04 [CONFAT)

11/08/04	35	Filed Appellant William G. Osborne's motion to dismiss Municipal aples: Anchorage Police Dept & Walt Monegan, Anchorage Police Dept Chief (CONFAT per promo) [04-35126] served on 11/3/04 [5231529] [04-35126]
11/09/04	36	Filed original and 15 copies appellee District Attorney's, Susan A. Parkes's brief, & -0- suppl excs; served on 11/3/04 [04-35126]
12/02/04	40	Filed order CONFATT (CLR) Aplt's unopposed mtn to partially dismiss this appeal as to aples Anchorage Police Dept & Walter Monegan, Anchorage Chief of Police is GRANTED. A certified copy of this order shall serve as the mandate of this crt as between aplt & aples Anchorage Police Dept & Walter Monegan only. This appeal remains pending as to the state aples. [04-35126]
12/13/04	41	Filed original and 1k5 copies William G. Osborne reply brief, (Informal: NO) 20 pages; served on 12/6/04 [04-35126]
06/21/05	49	Filed William G. Osborne additional citations, served on 5/5/05 (rec'd in docketing 6/21/05) PANEL [04-35126]
07/14/05	50	ARGUED AND SUBMITTED TO Alfred T. GOODWIN, Melvin BRUNETTI, William A. FLETCHER [04-35126]

09/08/05	54	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Alfred T. GOODWIN; Melvin BRUNETTI, author; William A. FLETCHER.) FILED AND ENTERED JUDGMENT. [04-35126]

RELEVANT DOCKET ENTRIES
United States Court of Appeals for the Ninth Circuit
Court of Appeals Docket #: 06-35875
William G. Osborne,
Plaintiff-Appellee
v.
District Attorney's Office for the
Third Judicial District; Susan A. Parkes,
Defendants-Appellants

10/17/06	2	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): YES. setting schedule as follows: appellant's designation of RT is due 10/16/06, ; appellee's designation of RT is due 10/25/06; appellant shall order transcript by 11/6/06, ; court reporter shall file transcript in DC by 12/5/06,, ; certificate of record shall be filed by 12/12/06 ; appellant's opening brief is due 1/22/07, ; appellees' brief is due 2/20/07; appellants' reply brief is due 3/6/07, ; [06-35875]
03/01/07	11	Filed original and 15 copies Appellant DA Office for Third, Appellant Susan A. Parkes opening brief (Informal: n) 59 pages and five excerpts of record in 2volumes; served on 2/26/07 [06-35875]
04/16/07	13	Filed original and 15 copies appellee William G. Osborne's 48 pages brief, served on 4/11/07 [06-35875]
05/14/07	16	Filed original and 15 copies DA Office for Third, Susan A. Parkes

reply brief, (Informal: n) 29 pages; served on 5/9/07 [06-35875]

07/12/07 27 Filed DA Office for Third, Susan A. Parkes additional citations, served on 7/9/07 PANEL [06-35875]

10/10/07 30 ARGUED AND SUBMITTED TO Alfred T. GOODWIN, Melvin BRUNETTI, William A. FLETCHER [06-35875]

04/02/08 33 FILED OPINION (ALFRED T. GOODWIN, MELVIN BRUNETTI and WILLIAM A. FLETCHER) AFFIRMED. [Affirmed; Terminated on the merits after oral hearing; Written, reasoned, signed, published; Judge: ATG On Panel But Did Not Write, Judge: MB Authoring, Judge: WAF On Panel But Did Not Write]. FILED AND ENTERED JUDGMENT.

04/16/08 34 Filed Appellants District Attorneys Office for the Third Judicial District and Susan A. Parkes motion to stay the mandate. Served on 04/14/2008.-- (faxed PANEL) [Edited 04/16/2008 by LC]

04/18/08 36 Filed order (ALFRED T. GOODWIN, MELVIN BRUNETTI and WILLIAM A. FLETCHER) Appellants' motion for stay of the issuance of the mandate pending application for writ of certiorari is granted. Fed. R. App. P. 41(d)(2). Therefore, it is ordered that the

mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. If filed, the stay shall continue until final disposition by the Supreme Court.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-97-00636 CI

WILLIAM OSBORNE,
Petitioner,

v.

STATE OF ALASKA,
Respondent

ORDER OF DISMISSAL

William Osborne was convicted of kidnapping, assault, and sexual assault in 1994. Case No. 3AN-93-02339 CR. Sidney Billingslea was Osborne's trial attorney. Osborne seeks post-conviction relief on grounds that Billingslea provided ineffective assistance of counsel at trial.

Counsel appointed to represent Osborne in these post-conviction relief proceedings reports that he believes there may be merit with regard to a portion of Osborne's claims: that Billingslea provided ineffective assistance of counsel by failing to seek to preclude the admission of the State's hair comparison evidence and by failing to test the DNA evidence under the more precise RFLP genetic testing method in addition to the PCR method that had been employed by the State. Counsel has also filed supplemental reports addressing issues of due process and methods for testing mitochondrial DNA that have been developed since Osborne's trial. He has also

reported that the Office of Public Advocacy is willing to pay for the additional genetic testing of evidence in this case. Counsel reports that, in his view, Osborne cannot demonstrate ineffective assistance of counsel with regard to the other claims asserted by Osborne. Osborne disputes his attorney's assessment of these other post-conviction relief claims. These claims include Osborne's assertion that his trial attorney provided ineffective assistance of counsel by failing to file a motion to suppress evidence seized from his room at the military base, failing to move to dismiss Count XII of the indictment, failing to move for separate trials for Osborne and his co-defendant Dexter Jackson, failing to adequately investigate in preparation for trial, and refusing to allow Osborne to testify on his own behalf.

The State has moved to dismiss this case. The State may move for dismissal of an application for post-conviction relief, rather than responding on the merits, when the application appears on its face to be deficient. When "an application for post-conviction relief alleges potential mistakes or oversights on the part of trial counsel but does not go on to allege facts ruling out the possibility of sound tactical choice, it fails to set out a *prima facie* case." *State v. Jones*, 759 P.2d 558,570 (Alaska App. 1988).

The seminal case for ineffective assistance of counsel in Alaska is *Risher v. State*, 523 P.2d 421 (Alaska 1974). That case established a two-pronged standard for evaluating ineffective assistance of counsel claims. The first prong requires the petitioner to prove that the performance of trial counsel fell below an objective standard: counsel must perform at least as well as a lawyer with ordinary training and skill in criminal law and must conscientiously protect [the]

client's interests, undeflected by conflicting considerations." *Risher*, 523 P.2d at 424. "Representation is constitutionally deficient only when it falls outside the wide range of professionally competent assistance. Thus, in order to prove ineffective assistance of counsel, the accused must establish a level of performance that no reasonably competent attorney would provide." *State v. Jones*, 759 P.2d 558, 568 (Alaska App. 1988)(citations omitted).

"In evaluating trial counsel's conduct, the court must apply a strong presumption of competence. An integral component of the presumption of competence is the further presumption that trial counsel's actions were motivated by sound tactical considerations. . . In the absence of evidence ruling out the possibility of a tactical reason to explain counsel's conduct, the presumption of competence remains unrebutted and operates to preclude a finding of ineffective assistance." *Id.*, 759 P.2d at 569. Thus, "if it appears that counsel's actions were undertaken for tactical or strategic reasons, they will be virtually immune from subsequent challenge, even if, in hindsight, the tactic or strategy appears to have been mistaken or unproductive." *Jones*, 759 P.2d at 569.

The second prong requires a showing of prejudice. "There must be a showing that the lack of competency contributed to the conviction." *Risher*, 523 P.2d at 525. This prong requires the accused "make a specific factual showing that counsel's incompetence had some actual, adverse impact on the case—that is, the accused must prove some effect of the challenged conduct on the reliability of the trial process." *Jones*, 759 P.2d at 573, (citations omitted).

The petitioner must prove the factual allegations with regard to each of the above two prongs by clear

and convincing evidence. However, that standard is inapplicable at this first stage of the post conviction relief proceedings, in which the State is seeking to dismiss the petition for failure to state a *prima facie* case of ineffective assistance. Summary disposition is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions and agreements of fact; together with any affidavits submitted [demonstrate] there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Criminal Rule 35.1(f)(3).

Osborne claims that his trial attorney provided ineffective assistance by failing to file a *posse comitatus* motion for the suppression of evidence seized from his room in the military barracks. Although it may be the case that another attorney would have moved for suppression of that evidence, the law presumes that Osborne's trial attorney's failure to do so was motivated by tactical considerations. And the materials before this court are consistent with that presumption. In her affidavit of March 12, 2001, Osborne's trial attorney unequivocally stated that "it was a strategic decision not to file motions to suppress items seized from Osborne's room on the military base: his clothing had a total absence of trace evidence linking him to the crime scene or victim. I wanted that to be known to the jury. . . ." Osborne's allegations, even if true, fail to establish that trial counsel's tactical decision was a level of performance that no reasonably competent attorney would provide. Nor has Osborne established that the seizure of the items from his room was unlawful, particularly since Osborne's roommate consented to the search of the room and signed the waiver form. Osborne has similarly failed to create a

reasonable doubt as to whether suppression of the items would have altered the jury's decision. *See Tucker v. State*, 892 P.2d 832, 834 (Alaska App. 1995). Therefore, Osborne has failed to set forth a *prima facie* case of ineffective assistance of counsel on this claim.

Osborne also asserts his trial attorney was ineffective in failing to request that he be tried separately from his co-defendant Jackson. Jackson had given a statement admitting his criminal conduct and naming Osborne as the man who committed the crimes with him. The law presumes that Osborne's trial attorney's failure to seek separate trials was motivated by tactical considerations. In her affidavit to this court, Osborne's trial attorney stated that she chose to proceed with a single trial so that Jackson and his prior statement would not be used against Osborne. Osborne insists that severance of the trials was necessary on grounds that his defense was irreconcilable with Jackson's defense. But Osborne's allegations, if true, still fail to establish that his trial counsel's failure to seek separate trials was anything other than a sound tactical decision. And as it was, Jackson's statement was not used at trial. Osborne has failed to set of a *prima facie* case of ineffective assistance of counsel on this claim.

Osborne also asserts that his trial attorney provided ineffective assistance by failing to move to dismiss Count XII of the indictment against him. However, Osborne was acquitted of Count XII. Osborne's post-conviction relief claim is not supported by assertions that would establish either that his trial attorney provided ineffective assistance by failing to move to dismiss this count of the indictment

or that Osborne was prejudiced when no such motion was filed.

At Osborne's trial, the State introduced hair comparison evidence demonstrating that hairs consistent with Osborne's hair were found on the victim's clothing. Osborne asserts that his trial attorney should have attempted to keep out such evidence. His trial attorney has stated that she did not move to prevent the use of hair comparison evidence for tactical reasons. She has stated that in making her decision, she knew of a different case tried shortly before Osborne's case in which the expert from the State crime lab had admitted that hair comparison was inexact and that the expert had erroneously "matched" hair samples from two different people. Osborne's trial attorney has also stated that when preparing for trial she believed Osborne would be helped by the fact that Negroid hairs different from Osborne's were also found on the victim's clothing. The facts alleged in Osborne's application on this issue, even if true, would not justify a finding that his trial counsel rendered constitutionally deficient performance. Thus, no *prima facie* case has been established on this claim.

Evidence in the criminal case against Osborne included semen on a condom found at the crime scene. The State undertook PCR DNA testing on the semen. These test results concluded that Osborne could be a possible donor of the semen. Osborne's trial attorney did not seek to have the semen tested using the more precise RFLP DNA testing method available at the time of trial. Osborne now asserts that his trial attorney provided ineffective assistance by failing to seek this more precise RFLP genetic testing. Osborne's trial attorney has stated that in

preparation for Osborne's trial she met with the DNA expert from the State crime lab, reviewed DNA research articles, and conferred with a Fairbanks public defender who was litigating the scientific basis of DNA testing. She has stated that she believed that the results using the PCR DNA testing were more favorable to Osborne than the likely result would have been had the RFLP DNA testing method been used. Trial counsel was concerned that if the evidence had been sent to the FBI Lab for RFLP testing, the results could have been even more conclusive against Osborne than the PCR DNA test results, thereby nullifying Osborne's misidentification defense. Accordingly, Osborne's trial attorney has stated that she chose to forego RFLP DNA testing because she disbelieved Osborne's statement that he did not commit the crime and elected to avoid the possibility of obtaining DNA test results that might have confirmed Osborne's culpability. In her words, trial counsel concluded, "Osborne was in a strategically better position without RFLP DNA testing." Osborne's trial attorney has stated that she discussed DNA testing issues with Osborne both in person and on the phone and that even if Osborne had desired more precise testing, she would have disagreed with that strategy and preferred the lower odds of the less-precise testing that was done. Osborne's assertions regarding his trial attorney's preparations are consistent with the legal presumption that she decided for tactical reasons to forego more precise genetic testing of physical evidence and to argue that the testing conducted by the State was inconclusive as to Osborne. There is no basis in the record to support a finding that trial counsel's strategic decisions were incompetent. Osborne has not asserted facts necessary to a *prima facie* case of ineffective assistance of

counsel based on failure to arrange for more precise genetic testing.

Nor does Osborne's trial counsel's tactical decision to forego seeking such additional testing of the DNA constitute a denial of due process to Osborne. There is no indication that Osborne had requested and was denied access to the government's evidence in the preparation of his case. *Cf. Ake v. Oklahoma*, 470 U.S. 68 (1985).

Osborne asserts that his trial attorney provided ineffective assistance of counsel by preventing him from testifying on his own behalf. Osborne waived his right to testify on the record after being properly questioned. But Osborne asserts that he chose not to testify after consulting with his trial attorney who had discouraged him from testifying by telling him that she was not prepared for such testimony. These allegations, if true, are insufficient to establish a *prima facie* case of ineffective assistance of counsel based on an alleged failure to advise Osborne regarding his right to testify in his own defense. *See Mute v. State*, 954 P.2d 1384 (Alaska App. 1998).

Osborne asserts that his trial attorney provided ineffective assistance by failing to adequately investigate facts and interview witnesses in preparation for trial. Osborne's trial attorney is presumed to have acted competently. *Newby v. State*, 967 P.2d 1008, 1015 (Alaska App. 1998). To make a *prima facie* case of ineffective assistance of counsel, Osborne must assert facts demonstrating that his trial attorney's representation was "outside the wide range of professionally competent assistance." *Jones*, 759 P.2d at 568. Osborne asserts that the defense team should have interviewed Captain Prinns to verify that Osborne was ordered to consent to the search of

his room, should have interviewed another woman who had purportedly been raped by Jackson and someone other than Osborne, and should have located Michelle H. who met Osborne on the night of the alleged crime. Counsel for Osborne has stated that Osborne's trial attorney retained two investigators, but that one of the investigator's files now lacks investigative notes. Although Osborne has identified some trial preparation steps that could have been but were not taken, Osborne has not alleged facts suggesting that his trial attorney's investigation of the case was "outside the wide range of professionally competent assistance." *Jones*, 759 P.2d at 568.

Counsel for Osborne has moved this court to order that the physical evidence presented at Osborne's trial be retested with methods that were not available at the time of Osborne's trial in order to determine whether Osborne was prejudiced by his trial attorney's failure to seek more precise genetic testing of the State's evidence. Under the circumstances of this case, in which Osborne's trial counsel made a strategic decision to reject more precise genetic testing methods that were available at the time of trial, and Osborne has not alleged facts satisfying the elements of a *prima facie* case that his trial attorney's representation was deficient, Osborne's request that this court order the State's evidence to be re-tested using newly available methods is DENIED.

For the foregoing reasons, William Osborne's application for post-conviction relief is DENIED.

Entered at Anchorage, Alaska this 20th day of June 2002.

/s/ Sharon L. Gleason
Superior Court Judge

FILED U.S. District Court
District of Alaska
2003 Jun 3 AM 11:42

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WILLIAM G. OSBORNE,	)	
	)	Case No. A03-0118CV
Plaintiff,	)	
	)	
v.	)	
DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ANCHORAGE, ALASKA; SUSAN A. PARKES, DISTRICT ATTORNEY, in her official capacity; ANCHORAGE POLICE DEPT., ANCHORAGE, ALASKA; WALT MONEGAN, ANCHORAGE POLICE DEPT. CHIEF OF POLICE, in his official capacity,	)	
	)	
Defendants.	)	

COMPLAINT

COMES NOW the Plaintiff, William G. Osborne, by and through his attorneys, Randall S. Cavanaugh of KALAMARIDES & LAMBERT, Peter Neufield and David Menschel of the INNOCENCE PROJECT, and hereby complaints against defendants, alleges as follows:

I. INTRODUCTION

1. This case arises from the Defendants' refusal to release biological evidence currently in their possession for the purposes of state of the art Short Tandem Repeat ("STR") and Mitochondrial DNA testing ("mtDNA") that could prove that Plaintiff William G. Osborne has been wrongfully convicted and is actually innocent of the March 22, 1993 sexual assault of K.G., the crime for which Mr. Osborne is currently incarcerated.

2. Mr. Osborne seeks to perform DNA testing, at his expense, on biological evidence that was collected pursuant to the criminal case against him and used by the State to convict him. This evidence includes (1) a condom containing semen that was used in the rape of K.G. and that the prosecution attributed to Mr. Osborne at trial; (2) a "negroid" pubic hair that was found inside the condom which the prosecution attributed to Mr. Osborne at trial; (3) a "negroid" pubic hair found on a sweater that was placed under the victim during her rape and that the prosecution attributed to Mr. Osborne at trial; (4) K.G.'s clothing that tested positive for seminal fluid and any other clothing that the victim was wearing that may contain semen; and (5) for comparison purposes, reference samples obtained from the victim, the defendants and alternate suspects. Advanced STR DNA

testing would be performed on all evidence with the exception of the "negroid" hair. The hair evidence will be subjected to mtDNA testing. Neither of these technologies was available when Mr. Osborne was tried.

3. DNA testing on any of the above biological evidence from the crime scene that excludes Mr. Osborne would represent profound evidence of his innocence. The STR DNA test results could then be placed into the state and national DNA databank system, which did not exist when Mr. Osborne was tried, and potentially identify the true perpetrator of this crime. The relief requested is limited to the release of the biological evidence for DNA testing.

II. JURISDICTION

4. This Court has jurisdiction over the subject matter of this Complaint pursuant to 42 U.S.C. § 1983 and 28 U.S.C. Sections 1331, 1343(a) (3) and 1343 (a) (4).

5. Venue is proper over the subject matter of this Complaint pursuant to 42 U.S.C. § 1391(b) (1) and (2) because the Office of the District Attorney and the Anchorage Police Department maintain their principal places of business within this District and the events and omissions giving rise to Plaintiff's claims occurred within this District.

III. THE PARTIES

6. Plaintiff William G. Osborne is presently incarcerated at the Spring Creek Correctional Facility, serving a 26 year sentence. The sentence was imposed by the Superior Court of the State of Alaska, Third Judicial District, for kidnapping, first-degree assault and two counts of first-degree sexual assault.

7. Defendant Anchorage District Attorney's Office, Third Judicial District, is the prosecuting agency of Anchorage, Alaska.

8. Defendant Susan A. Parkes is the District Attorney for the State of Alaska, Third Judicial District, in Anchorage, Alaska. As the District Attorney, Ms. Parkes is responsible for formulating policy relating to access to evidence within the possession and control of the District Attorney's Office. She is sued in her official capacity.

9. Defendant Anchorage Police Department, including its crime laboratory and property and evidence department, is the law enforcement agency of Anchorage, Alaska.

10. Defendant Walt Monegan is the Chief of Police for the Anchorage Police Department. As the Chief of Police, Mr. Monegan is responsible for formulating policy relating to access to evidence within the possession and control of the Anchorage Police Department. He is sued in his official capacity.

11. At all times pertinent to this case, the defendants have acted under color of state law.

IV. FACTUAL BACKGROUND

A. The Incident

12. On March 11, 1994, Plaintiff William G. Osborne was tried and convicted by a jury of kidnapping, first-degree assault, and two counts of first-degree sexual assault. Mr. Osborne was sentenced to twenty-six years by the Honorable Milton Souter, Superior Court Judge for the Third Judicial District in Anchorage, Alaska.

13. Mr. Osborne was tried jointly with co-defendant Dexter C. Jackson. On March 11, 1994,

Dexter Jackson was convicted of kidnapping, first-degree sexual assault, first-degree assault, and third degree assault, and was sentenced to twenty-seven years.

14. Mr. Osborne's and Mr. Jackson's convictions stemmed from a single incident, a sexual assault and attack perpetrated on March 22, 1993, by two assailants against K.G., a single victim.

15. On March 22, 1993, K.G., an admitted prostitute, was soliciting customers in the Spenard Road area of Anchorage, Alaska. (Exhibit A, pp. 625, 667, 735-37).[1] At nine o'clock in the evening, K.G. agreed to perform fellatio for $100 on two men who drove up to her. (Ex. A, p. 628). The three drove off looking for a secluded area in which to park and spent some time driving in and out of prospective areas. Once parked, the two men forced K.G., at gunpoint, to perform fellatio on the male driver while the male passenger penetrated K.G. vaginally. (Ex. A, p. 635-36). The passenger wore one of the condoms K.G. had with her while he vaginally penetrated K.G. (Ex. A, pp. 636, 754, 813). Afterwards, K.G. attempted to gather her clothing and leave, but she was choked. (Ex. A, p. 639). K.G. struggled out of the vehicle and again attempted to gather her clothing, but her attackers caught up with her and beat her with a blunt instrument. (Ex. A, p. 656-57). The attackers fired a bullet in K.G.'s direction which grazed her. (Ex. A, p. 658).

16. On March 28, 1993, six days after the attack on K.G., military police officers Matthew Ecker and

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[1] Relevant portions of the trial transcript from the criminal action against Mr. Osborne, *State of Alaska v. William Osborne*, Case No. 3AN-S93-2339 CR (1993), have been attached hereto as Exhibit A.

Brand Briggs pulled Dexter Jackson over on Fort Richardson for flashing his headlights at another vehicle. (Ex. A, p. 928 (testimony of Matthew Ecker); Ex. A, pp. 940-41 (testimony of Brand Briggs)). Dexter Jackson had a gun in his glove compartment and a Swiss army knife in his possession. (Ex. A, pp. 929-30, 941). The military officers then contacted the Anchorage Police Department because Mr. Jackson's car was the same make, model and color as the car used in the attack on K.G. Mr. Jackson suggested to the Anchorage Police that Mr. Osborne had been with him on the night in question.

B. Eyewitness Identification

17. At trial, K.G. testified that the male passenger who attacked her was black, 6 feet tall, weighed 180-190 pounds, was clean shaven, with his head hair shaven on the sides and longer on top. (Ex. A, pp. 711-12) K.G. also reported that the passenger was not wearing jewelry. (Ex. A, p. 253). K.G. further testified that, at a police lineup after the incident, she identified Mr. Osborne as the member of the photographic lineup who was "most familiar" to her and the "most likely" to have been the male passenger who attacked her. (Ex. A, p. 713).

18. At trial, K.G. pointed to Mr. Osborne and identified him as the passenger who attacked her. (Ex. A, p. 672).

19. Despite its apparent force, identification of the perpetrator by the victim of a crime can be extraordinarily unreliable. *See* Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 1, 1-3 (1988) (explaining that "eyewitness testimony is among the least reliable forms of evidence

and yet persuasive to juries"). And, there is increasing evidence that mistaken eyewitness identification is one of the primary causes of wrongful convictions. *See* Elizabeth Loftus, *Ten Years in the Life of an Expert Witness*, 10 Law & Hum. Behav. 241, 243 (1986) (estimating that half of all wrongful convictions are caused by mistaken eyewitness identifications).[2]

20. Eyewitness identifications are particularly unreliable when, like in this case, there is a disparity between the race of the perpetrator and the race of the victim. It is widely accepted that people are worse at identifying individuals of a different race than they are at identifying individuals of their own race. *See* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 Am. J. Crim. L. 207, 209-12 ("it is well documented that cross-racial identification is less reliable than identification of one person by another of the same race"). This phenomenon is called the "other-race effect" and is thought to have a significant impact on eyewitness reliability in the context of criminal prosecutions. Gary L. Wells & Elizabeth A. Olsen, *The Other-Race Effect in Eyewitness Identification: What Do We Do*

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[2] The U.S. Department of Justice released a study of 28 cases in which individuals were wrongfully convicted and later exonerated by DNA. In every case, except for homicides, the victim(s) identified the defendant prior to trial and at trial. Edward Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 15 (National Institutes of Justice, Office of Justice Programs, U.S. Department of Justice) (1996). The report states, "[I]n the majority of these cases, given the absence of DNA evidence at trial, the eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong." *Id.*

About It, Psychol., Pub. Pol'y & Law, March 2001 Vol. 7, No. 1, 230, 231.

21. In addition, although conventional wisdom suggests that stress enhances a witness' ability to perceive and remember a perpetrator's physical characteristics, *see, e.g., Commonwealth v. Roddy*, 39 A. 211 (Pa. 1898) (stating that where assailants tied up a witness and his wife and threatened to shoot the witness "every particularity of each of [the assailants] must have been literally burned into the memory of both [the witness] and his wife"), scientific studies show that the opposite is true and that "[a]ll other factors being equal, a witness in a high stress situation is more likely to be an unreliable witness than one not under such stress." *See* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 Am. Crim. L. Rev. 1013, 1023 (1995); *see also* Otto H. MacLin, et al., *Race, Arousal, Attention, Exposure and Delay: An Examination of Factors Moderating Face Recognition*, Psychol., Pub. Pol'y & Law, March 2001 Vol. 7, No. 1, 134-52 (stress decreases an observer's ability to identify the person observed).

22. In the instant case, the fact that the victim is white and that Mr. Osborne is African American and the fact that the victim was under the severe stress of being sexually assaulted, choked, beaten, and shot at, suggests that the victim's identification is likely to be even less reliable than the typical identification.

23. Unlike eyewitness identification, DNA evidence is immune to imperfections of perception and memory. DNA testing has the power to prove, conclusively, whether Mr. Osborne was one of the men who beat and sexually assaulted K.G.

C. Biological Evidence

24. Following the incident, the Anchorage Police Department investigated the scene of the assault to secure evidence. (Ex. A, p. 248). In the bloody snow where K.G. was beaten, the police recovered the blue condom used in K.G.'s rape, as well as a condom wrapper, a spent shell casing, and two pairs of K.G.'s bloody gray knit pants that K.G. had worn the night of her attack. (Ex. A, pp. 248-49 (State's opening statements); Ex. A, p. 339 (testimony of Detective Howard Shore)).

25. K.G. was taken to the hospital by the investigating detective, Linda Branchflower, on the night after her attack. (Ex. A, pp. 464-65). A rape protocol kit was collected, but only hair and blood samples were collected from K.G. At trial, Detective Branchflower testified that a vaginal examination was not requested or performed for two reasons. First, she did not suspect any semen would be found in the victim's vagina because the rapist wore a condom at the time of K.G.'s assault. (Ex. A, pp. 469-70). Second, Detective Branchflower testified that K.G. had showered since her attack. (Ex. A, p. 470).

1. Semen Evidence

26. At Mr. Osborne's criminal trial, Lee Ann Strickland, a serologist with the Alaska State Crime Lab, testified about her examination of the condom from the scene of the attack revealed intact spermatozoa. (Ex. A, p. 1762). She performed DQ Alpha DNA testing on the sperm from the condom.

27. In 1993, forensic DNA testing was in its relative infancy. Prior to DNA testing, serologists relied on ABO conventional blood-typing to profile biological stains recovered from a sexual assault. The

first method developed for typing amplified DNA samples was the DQ Alpha DNA test which was attempted in this case with only limited success. The two limitations of conventional serology are that it is neither sensitive (able to obtain results from minute specimens) nor particularly discriminating (able to eliminate almost everyone as a potential donor). The first generation amplified DNA testing - DQ Alpha DNA testing - was sensitive but it was not significantly more discriminating than ABO blood testing.

28. At trial, Ms. Strickland further testified that she performed DQ Alpha type DNA testing on the spermatozoa and that the spermatozoa revealed a DQ Alpha profile of 1.2, 4. (Ex. A, p. 1762). Ms. Strickland concluded that Mr. Osborne was one of the 14.7% - 16% of the black population who exhibited this same DQ Alpha DNA profile. (Ex. A, p. 1764). This is no more discriminating a test than conventional serology. The frequency of ABO type B and type AB in the black population is even lower than the DQ Alpha profile identified from the condom. In contrast, the current 13 STR marker DNA test used in Alaska and throughout the country, will generate a nearly unique profile for each individual. Instead of a frequency of 14.7%, a 13 marker STR DNA profile will have a frequency no higher than one in a billion. Thus the ability of the new STR test to exclude everyone but the real perpetrator is extraordinary.

29. State crime lab analyst Lee Ann Strickland also testified that she tested K.G.'s clothing for the presence of semen. (Ex. A, pp. 1729-30). Specifically, Ms. Strickland examined K.G.'s outer sweater which was placed under K.G. while she was raped and Ms. Strickland found that the sweater effloresced, indi-

cating the likely presence of semen. (Ex. A, p. 1730). Ms. Strickland also tested K.G.'s brown and white sweater and K.G.'s multi-colored turtleneck. Ms. Strickland testified that both of these articles of clothing effloresced, indicating the likely presence of semen. (Ex. A, p. 1731-32).

2. Hair Evidence

30. At Mr. Osborne's criminal trial, Janeice Fair, a criminalist in the Alaska State Crime Laboratory, testified at Mr. Osborne's criminal trial that she microscopically examined hair evidence from the crime scene. Ms. Fair testified that a "negroid" pubic hair found on the sweater that was spread beneath K.G. while she was raped was characteristically similar to Mr. Osborne's pubic hair. (Ex. A, pp. 1092-93). Ms. Fair further testified that she examined a "negroid" pubic hair found on the condom that was retrieved from the scene of the assault, and she concluded that this hair also exhibited the same characteristics as Mr. Osborne's pubic hair. (Ex. A, p. 1094).

31. State crime lab analyst Lee Ann Strickland further testified about her examination of hair evidence recovered from the crime scene. Ms. Strickland testified that she examined both the hair from K.G.'s sweater and the hair from the condom, but was unable to obtain a DQ Alpha DNA profile from either hairs' shaft or root. (Ex. A, p. 1723, 1726). A much newer technology - mtDNA testing - is likely to secure a genetic profile where DQ Alpha testing previously failed.

32. Nuclear DNA testing - of which DQ Alpha testing is a primitive type - is only capable of achieving a result from a hair when that hair has a root or follicle

attached. When only the shaft of the hair is available, nuclear DNA testing is not capable of producing a result. *See* National Institute of Justice, U.S. Department of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* at 60 (hereinafter "N.I.J. Report") (stating that if the DNA sample to be tested is a hair shaft, nuclear DNA testing will not achieve a result). However, mtDNA testing is capable of producing a result on a hair shaft or other hair fragment even when DQ Alpha testing and other nuclear DNA testing methods cannot produce a result.[3] This is because, unlike nuclear DNA testing, mtDNA testing does not require the presence of a hair root or follicle. As the Supreme Court of South Carolina explained in *State v. Council*, "unlike nuclear DNA, which is only present in the living cells at the roots of a pulled hair, mtDNA is present in the shafts of hair." 515 S.E.2d 508, 516 (S. Car. 1999). Therefore, mtDNA tests can produce results on the hairs even when DQ Alpha failed to produce results. Because of its ability to get results from hair shafts when nuclear testing could not, mtDNA testing is the standard method of testing hair shafts. *See* N.I.J. Report at 107. The results of

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[3] There are two types of DNA found in a human cell. The DNA that resides in the nucleus of the cell is called nuclear DNA. There is also a chromosome of DNA outside the nucleus lodged in an organelle called the mitochondrion. This is the mitochondrial DNA or mtDNA. Each mitochondrion contains eight or ten chromosomes. There is, therefore, a greater quantity of mtDNA available for forensic examination than there is nuclear DNA. MtDNA is also more resilient than nuclear DNA; for example, in a number of cases, old teeth, bones or hair that have been exposed to environmental wear and tear have been found to have sufficient mtDNA for purposes of forensic examination, even though nuclear DNA typing, like an STR DNA test, would fail to get a result.

mtDNA testing are widely admissible in American courts. *See, e.g., State v. Pappas*, 776 A.2d 1091 (Conn. 2001); *State v. Council*, 515 S.E.2d 508, 516 (S. Car. 1999); *State v. Underwood*, 518 S.E.2d 231 (N. Car. 1999).

D. State's Use of Biological Evidence Against Mr. Osborne

33. During its opening statement, the State attributed biological evidence from K.G.'s attack to Mr. Osborne. Specifically, the prosecutor repeatedly referred to the blue condom that K.G. had in her purse on the evening of her attack which was used in her sexual assault and which was later recovered from the crime scene. (Ex. A, pp. 240, 242-43, 251). And, the prosecutor unequivocally stated that Mr. Osborne wore this condom when he vaginally penetrated K.G. (Ex. A, pp. 240, 243, 251). The prosecutor stated that "Osborne penetrated her vaginally with his fingers and then with his penis. He wore the blue condom." (Ex. A, pp. 242-43). Relying on the crime lab's testing, the prosecutor further argued that the condom contained Mr. Osborne's semen. (Ex. A, p. 251).

34. The State also asserted that hair evidence definitively implicated Mr. Osborne in the attack on K.G. The State emphasized that pubic hairs found on both the condom and the sweater that was underneath K.G. while she was raped matched Mr. Osborne's pubic hair. (Ex. A, pp. 251-52).

35. In its closing, the State again asserted that the hairs found on the blue condom and on the sweater that was spread beneath K.G. were Mr. Osborne's and conclusively linked him to the attack on K.G. (Ex. A, pp. 2203-05, 2214, 2229, 2345).

36. In its closing remarks, the State emphasized that "[K.G.] was carrying condoms that night in a blue foil packet, and part of the wrapper was found right by the blue condom that had William Osborne's semen in it." (Ex. A, p. 2191). The State unequivocally argued "[this] is very damning evidence. It turned out to be incredibly damning with both [Osborne's] pubic hair and his semen on the condom." (Ex. A, p. 2229; *see also* Ex. A, pp. 2203, 2214, 2229, 2345).

E. Modern DNA Testing Can Prove Mr. Osborne's Actual Innocence

37. Post conviction DNA testing has exonerated defendants in over 127 cases.

38. Mr. Osborne's case involves a sexual assault perpetrated against one victim by two assailants. Spermatozoa and pubic hair were recovered from the scene of the attack. While the rudimentary testing procedures used at the time of trial failed to provide conclusive evidence of the donor of that biological material, the State specifically attributed both the hair and spermatozoa to Mr. Osborne. If STR DNA testing of semen found at the crime scene reveals that Mr. Osborne is not the source of this biological material, this testing would constitute powerful new evidence of Mr. Osborne's innocence. Similarly, if mtDNA testing reveals that Mr. Osborne is not the source of the pubic hairs found on the victim's body and at the crime scene, this testing would also constitute powerful new evidence of Mr. Osborne's innocence.

39. On August 20, 2002, the Superior Court of the State of Alaska, Third Judicial District, granted an unopposed Order for Preservation of the Evidence

requiring the State of Alaska to preserve all evidence in Mr. Osborne's case. (A copy attached hereto as Exhibit B). However, requests made to the Alaska District Attorney's Office, Third Judicial District, and to the Anchorage Police Department to provide access to the biological material for the purposes of DNA testing have been refused.

First Claim for Relief -
Violation of Due Process of Law

40. Plaintiff alleges the foregoing paragraphs as though fully set forth herein.

41. By refusing to release the biological evidence for DNA testing, and thereby preventing Mr. Osborne from gaining access to evidence which could exonerate him as the perpetrator, Defendants have deprived Mr. Osborne of access to exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963), and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Second Claim for Relief - Actual Innocence

42. Plaintiff alleges the foregoing paragraphs as though fully set forth herein.

43. By refusing to allow the release of biological evidence for DNA testing, Defendants have deprived Mr. Osborne of the opportunity to make a conclusive showing that he is actually innocent of the crimes for which he is currently incarcerated, in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Third Claim for Relief - Cruel and
Unusual Punishment

44. Plaintiff alleges the foregoing paragraphs as though fully set forth herein.

45. By refusing to allow the release of biological evidence for DNA testing, Defendants have deprived Mr. Osborne of an opportunity to make a conclusive showing of actual innocence, in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the U.S. Constitution.

Fourth Claim for Relief - Clemency

46. Plaintiff alleges the foregoing paragraphs as though fully set forth herein.

47. Defendants, by refusing to permit Mr. Osborne access to biological evidence for DNA testing so that he could prove his innocence, have deprived Mr. Osborne of his right to a fair executive clemency proceeding where he can make a showing of actual innocence.

Fifth Claim for Relief - Confrontation and Compulsory Process

48. Plaintiff alleges the foregoing paragraphs as though fully set forth herein.

49. By refusing to release biological evidence for DNA testing, Defendants have deprived Mr. Osborne of his right to present evidence of innocence in State Court, Federal Court, or before the Alaska Parole Board in violation of the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the U.S. Constitution.

Sixth Claim for Relief - Right of Meaningful Access to Court

50. Plaintiff alleges the foregoing paragraphs as though fully set forth herein.

51. By refusing the release of biological evidence for DNA testing, Defendants have arbitrarily denied

Mr. Osborne of his right to meaningful access to state and federal court to establish that he is actually innocent of the crimes for which he is currently incarcerated, in violation of *Ex Parte Hull*, 312 U.S. 546 (1941), *Christopher v. Harbury*, 536 U.S. 403 (2002), the Petition Clause of the First Amendment to the U.S. Constitution and the Due process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

WHEREFORE, Plaintiff William G. Osborne prays for judgment as follows:

A. Equitable relief, in the form of the release of the biological evidence collected in connection with the crimes of which Mr. Osborne was convicted and the transfer of such evidence for DNA testing to Dr. Edward Blake at Forensic Science Associates, 3053 Research Drive, Richmond, California 94806. In the event that Dr. Blake determines that any of the evidence is not suitable for nuclear DNA testing, such evidence will be forwarded to Dr. Terry Melton at Mitotyping Technologies, 1981 Pine Hall Drive, State College, Pennsylvania 16801, for mtDNA analysis;

B. Reasonable attorney's fees and costs;

C. Such other and further relief as this Court may deem just and proper.

DATED this 29 day of May, 2003, at Anchorage, Alaska.

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[Exhibit A to Complaint:
Excerpts of Transcript, Alaska Superior Court,
State v. Jackson / Osborne, Nos. 3AN-93-2338 CR and
3AN-93-2339 CR]

[239] based on the evidence. Make up your minds based on the evidence. Don't make up your minds on the basis of anything that's said or not said during opening statements. Ms. Wibker, you may proceed with the State's opening statement.

MS. WIBKER: Thank you, your Honor. Good morning. On Monday evening, March 22nd, 1993, at around 9:00, 9:30 in the evening, William Osborne and Dexter Jackson got [K.G.] to enter the car they were in by promising to pay her for sex. They drove her out to a secluded area, out in the Earthquake Park area, pulled a gun on her, took turns having sex with her at gunpoint, then instructed her to get out of the car and lie facedown in the snow. [K.G.] refused to do that. When she refused to do that, she was hit in the head with a gun, like that gun, was choked, she was beaten with a wooden bat or an ax handle or long wooden object repeatedly by both of them. She was then shot in the head, buried in the snow, and they left her for dead. What I've just told you is the three-sentence version of what this trial is about. It's going to take 35 witnesses to come in here, approximately, and tell you the whole story. Each person has an important piece to tell. I'm going to tell you what those 35 witnesses will say this morning. And as I tell you what I expect them say, it's going to sound at times like I'm giving you lots of little picky details, but as I tell you this story, it's almost like reading a mystery, where little details at the [240] beginning that don't seem so significant, take on significance later and become critical to solving the

puzzle and knowing what happened in Earthquake Park on March 22nd. So as I give you these details, I'm asking you to pay attention. March 22nd, Monday night, [K.G.] was walking in Spenard near Chilkoot's and La Mex, down in that area. She was wearing layers of clothing, several shirts, several sweaters. She had on a pair of gray knit pants with a little hole in the crotch, underneath a pair of blue jeans. She had on boots, she had on a baseball hat, she had on socks, she had a little glass crack pipe in her socks. She carried a small black purse that looked like a binocular bag. It had three zipper compartments to it. Inside of her purse, she had cosmetics, she had a blue condom, she had some playing cards, and she had some perfume samples, one of those samples being a dark-colored bottle of Tride perfume, dark so that it could be purplish or black. She carried less than a dollar in change, mostly in pennies, and she carried a Swiss army knife—a little red Swiss army knife, and it had two little tiny black hash marks on one end. William Osborne had been in the Space Station that night with two of his Army buddies, Cedric Robinson and Johnny Riley. Riley drove the three of them to the Space Station in his white car. Osborne was wearing a dark sweat suit and a baseball hat. In the Space Station that night, Osborne called Jackson twice from the pay phone. There's two pay phones [241] there. He called once from each phone. Once at a little after seven, and once at a little after eight. We know that, because the video—the Space Station runs video cameras of what happens inside, and one of those cameras is on the back door near where they were parked, and one of those—the camera also shows the pay phones. The three guys left the Space Station at about 9:30 that night. They had just barely pulled away on Spenard Road, when Jackson comes

up behind them and flashes his lights behind their car. They know Jackson's car. He's one of their Army buddies. They know he drives a red Nissan Sentra. They pull over and Osborne gets out and gets into the red Nissan Sentra that Jackson was driving. Riley and Robinson go off and do something else that night. Jackson had in his car with him, his .380 semiautomatic pistol, and he had some kind of a wooden axe handle or a bat-like instrument in the trunk. Well they drove up and down Spenard a couple of times, they saw [K.G.], they yelled at her if she wanted a ride, and as it turns out, they pulled over and the three of them talked. There was an agreement that [K.G.] would give them oral sex in exchange for $100.00. She got in the car. They headed out toward Earthquake Park. Now she doesn't know them. She doesn't know their names, and to her, they're only the passenger and the driver. They were later identified as Jackson being the driver and Osborne being the passenger. But [K.G.] will [242] tell you, as they headed out to Earthquake Park, it seemed weird. She says they talked a lot to each other, but not to her. They ask her if she had a weapon. She told them she had a Swiss army knife and they took it from her, put it on the dash of the car. She remembers noticing that the back windows of the car, she was in the back seat, were triangular oval-shaped and they popped out. They didn't open. They were just for vent windows. She remembers that going through her head because during the night when she was in the back of the car, she was thinking about whether she could get out. Well they drove out toward Earthquake Park and they kept pulling into areas and pulling out, pulling in and pulling out. Finally, off of the Point Woronzof, they pulled off on a service road that went back where

there was a fence and a T-shaped area. They stopped in that area. [K.G.] got in the front and the passenger got in the back, the passenger being Osborne. And [K.G.] noticed that he had his hands sort of in his pockets. After Osborne got in the back seat, [K.G.] said she wanted her money upfront. They said, well don't you trust us? She said, no. Osborne said, I think you will, and he pulled the gun. [K.G.] was then instructed to perform oral sex on Jackson, while Osborne held the gun on her. She asked Jackson to wear the blue condom she had in her purse and he refused. Well before Jackson was finished with her, Osborne passed the gun to Jackson and then Osborne penetrated her vagina with his [243] fingers and then with his penis. He wore the blue condom. Before doing the sex, they spread out one of her sweaters on the front seat of the car for her to be on top of when the sex was going on at gunpoint in the front seat. At this point, they were all in the front seat. Osborne had moved around when he started having sex with her. And she noticed as they spread the sweater out on the front seat, that there was a stain on the front passenger seat of the car. So Osborne had sex with her, while Jackson holds the gun on her. They instruct her to get out of the car and lie facedown in the snow. She asked them if they're going to kill her, and she starts telling them, I'm a good person, I don't deserve this. She tries to grab for some of her clothes. Jackson hits her in the head. He's in the driver's seat. He hits her on the left side of the head with the gun. Then he instructs Osborne to choke her. Osborne gets his arm around her neck and begins to choke her. He chokes her until she defecates in the front seat of the car. She lost control of her bowels. When she defecated on the front seat of the car, they got angry. Osborne backed away, and she was able to grab some

clothes and get out of the car, and get away from the car. They then threw some of her clothes out of the car at her, and at that point, she remembers Jackson coming around from the driver's side to the passenger side, and she remembers Osborne having the gun and firing it into the air. Osborne then opens the [244] trunk and gets something that she described as a baseball bat, a long hardwood, wooden object. They then begin to hit with the bat. She's got some clothes on, she's trying to run, and they're hitting at her legs, saying, go down bitch, go down. Well they get her down. When they get her down, she remembers pulling her sweater up over her head to try to protect her head, and she remembers putting her arms in front of her stomach to try and protect her stomach from the blows, and she remembers being on her back a lot of the time. And so they hit her over and over again, taking turns with the bat or bat-like object, whatever it was, hit her on the legs, hit her on the arms, hit her in the head. She thinks probably 20 times she was hit with the bat. Jackson then takes her legs. She's on the ground on her back with her legs sort of up. Jackson spreads her legs, takes the bat and drives it straight down between her legs so that the bat actually hits a bone in her pubic area. The only way she knows how to explain that is to call it a symbolic gesture. She said she had her jeans on. She remembers the bat hitting her crotch so that it actually spread the lips of her vagina apart. After this, she remembers being on her side, rolled up in a fetal position, and she could just see out through her arms. She could see the feet of her attackers. She knew that Osborne was wearing a dark colored sweatshirt and dark colored sweatpants. She remembered Jackson wore jeans and a dark sweatshirt, and she remem- [245] bers maybe something orange, or

some writing on the front of Jackson's shirt. But she's peeking out through her arms and she can see their feet about three feet away from her, and she hears a gun fire from the direction of the person that she thinks is Osborne's feet, and something hits her in the head, and she plays dead. She just lies there, she goes limp. They proceed to bury her. They put her in the snow—in a snow berm, cover her up with snow. The only part of her that's not covered up is her legs. The rest of her is buried. She then hears them kind of walking around for a minute and then she hears the car leave. She stays there for a while. She doesn't know if they're still there, if they're coming back, what, so she stays there for a while, and after a while, she digs out of the snow. And when she digs out of the snow, the first thing that she does is say to no one in particular, yes, as she realizes she's alive. She remembers being kind of dazed and making her way to the main road, down the service road, out to the main road at Point Woronzof. And when she gets out there, she sees some headlights, and her first thought is well that could them, but she notices this is a big car, and her attackers were in a little—a small red car. And she sees the car is bigger, so she flags it, she waives it, and the people stop. The people in that car are Albert Lee Mills and Michelle Rhyne. They stop and pick her up and agree to give her a ride home. And they notice when she gets in the car, [246] her hair is soaking wet, and her hair has little like snowballs in it, little snow clots in it—matted in it. Her sweater is wet. They see a little spot on the left side of her face that they think is blood. They see she's visibly in pain and its obvious she's been beat up. At one point on the ride home, which was a short ride—[K.G.] lived near the area, she takes—[K.G.] takes the baseball hat off of her head, and when she

takes her hat off, Michelle can see a dark, matted area in her hair that's sort of clotted, matted up, and Michelle says she doesn't know what it was, but it was a dark spot and it looked like it could have been mud or blood. And they could see [K.G.] rubbing that spot like it was in pain. Well [K.G.] told them what happened and they said, well let us take you to the police. And she refused to go to the police. She told them that she had a warrant out for her arrest, that she had had a shoplifting conviction back in 1991 and she had been ordered to do some community work service that she never did. So she didn't want to go to the police because she was afraid she would be arrested.

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(Tape changed)

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She said, well let us take you to the hospital. You obviously need medical care. She didn't want that either. She just [247] wanted to go home, so they took her home. Well the next morning, Albert Lee Mills and Michelle went back out and found the turnoff on the little service road where they had picked her up. This was around Noon the next day, which would be Tuesday, March 23rd. It had been snowing that day. They drive out and drive into the service road and get out and walk around. They noticed there was some blood in the snow. They notice some bloody clothing in the snow. Mr. Mills will tell you it sort of looked like women's long johns, gray knit clothing. They noticed a condom in the snow. They noticed they found a disturbed area in a berm that had blood in it. Mr. Mills had a good friend that jogged out in that

area, named Tuck Slowzar (ph), and he decided he'd better tell his friend Tuck maybe it's not such a good idea to jog out there. They also went back to the place where they dropped off [K.G.] the night before, went to the door where they saw her go in, Michelle went and knocked, and a man came to the door, thanked them for bringing her home the night before, and said that he thought that she was going to be okay. And Michelle Rhyne left her phone number with the man and again offered to help. That evening, Michelle and Lee Mills went to church. It was a revival week at their church. When they came back from church, they had two messages on their answering machine on the recorder. One was from the man that had answered the door where they had dropped [K.G.] off, and he thanked them [248] again for bringing her home. The other was a message to go down to Tuck Slowzar's (ph) house, the person that they had told, maybe you shouldn't jog out there. So Lee Mills went down to Tuck's house and the police were there, and the police wanted Lee Mills to show them where this woman lived that they had dropped—that he had dropped off the night before, and where was this place he had been, where he—that he thought was the scene of the crime. So Lee Mills agreed to do that. She showed the police where he dropped off the woman the night before and he showed the police the scene. While some police officers were at [K.G.]'s residence trying to find out from her, a very reluctant witness, what had happened, others, who are called the crime scene team, went out to the scene and began to secure it and collect evidence. What did they find at the scene? Two pair of gray knit pants. One pair was a gray pair of stretch pants that had a tiny little hole in the crotch. Both pairs had blood on them. They found a blue condom in the snow. Because it had snowed, the

police had to blow layers of snow away to collect evidence, and after they blew away some snow, they found a spent shell casing in the snow. It was very near where the condom was found. Near that spent shell casing were some tire tracks. The police found the disturbed berm in the snow that had blood soaked into it, in an area of about eight or—eight by ten inches that was soaked with blood, and blood was on the ground. They found [249] two sets of fresh tire tracks, and again, it had snowed that morning. When they compared those tire tracks to the tire tracks of Lee Mills and Tuck Slowzar, they found that they matched those. These were the tire tracks that were higher up. The tire tracks by the shell casing were lower down. They found some shoe prints and did some castings of the shoe prints, but when Tuck and Michelle and Lee Mills brought their shoes down to the police station, they found the shoe prints were their's, so those were eliminated as suspect prints. Meanwhile, police are at [K.G.]'s home trying to find out what happened. She's wrapped up in a blanket, in obvious pain, having trouble moving without wincing, and she doesn't want to say anything. All she'll say is her name is [K.G.]. And the police are saying, look, we've got reason to think a serious crime happened here. We need to know what happened. And finally, she says, well I'll just tell you enough—if you want to catch these people, I'll tell you what I know about them, but I'm not going to tell you very much about myself. And little bits and pieces of the story start to come out. [K.G.] is taken to the emergency room that night after she goes back to the scene. She goes with the police and shows them what happened where. Then the police take her to the emergency room, and for the first time, it's at the doctor's office where they find out her full name. She

wouldn't say it before then. And for the first time, they're able to [250] get some kind of a sequence, a chronology of what happened the night before out at the scene. But [K.G.] says that she was hitchhiking at that point. She doesn't say that she was prostituting. And there were little cuts to her feet that were found in the emergency room and she said that when she tried to run one time, there was cut glass in her socks that cut her feet. And at first she said she didn't know how that got there. Well when she was examined at the doctor's office, photos were taken of her. She had long, cylindrical-shaped bruises all over her body, all over her legs, on her arms. She had lumps and bruises all over her head. Some of the bruises were red, strawberry-colored. She had lumpy areas that were bruised on her arms. She had a large bruise on the front of her chest. At some point in this, she remembered being kicked, but doesn't know when or what kind of shoe did it. She remembers a kick to the chest. She has a strange little mark on her back that nobody can really understand. She remembers something sharp hitting her in the back when she was being hit with the bat. So all these injuries are photographed, but she had an oozing, open would in her head, and that oozing wound is sort of linear shaped. And a few days later, she is taken to a pathologist, and the pathologist says, that wound's consistent with being grazed by a bullet from a .380 that was shot from about three feet away. I spent some time on the evidence that was collected at the scene. I [251] talked about the condom, the shell casing, the clothing. Those things were gathered up and sent to the crime lab for processing. And the clothing that [K.G.] was wearing when she was assaulted was all gathered up and sent to the crime lab for processing. The crime lab will come in and

testify that the blue condom found in the snow had semen in it, and from that semen they were able to take what's called a DNA blood type, which is different from—most of us are familiar with A and O and AB positive. This is a DNA blood type. It's a little different. But they took a blood type from the semen in the condom, and they took a sample of the blood from William Osborne and Dexter Jackson, and they found that the DNA blood type in that condom matched the DNA blood type of William Osborne. That's important because that particular blood type is only found in 16 percent of the black population, which means that you take the whole population and then take out the part that's black, which includes male and female, and then you take 16 percent of that. That's the group that contains persons that could have deposited that semen. They also found a pubic hair on that condom, and they examined the pubic hair at the crime lab and it matched the pubic hair that William Osborne has. The crime lab will tell you that the spent shell casing that was found near the tire tracks and the condom was fired from Dexter Jackson's gun. The crime lab also found a pubic hair matching William Osborne's on [K.G.]'s [252] sweater—one of the sweater's that she wore that night, that she was layered in several sweaters. When the police examined Dexter Jackson's car, they took the tires off and put ink on the tires, and then rolled them out so that they make a print of the tread. And they took that inking of the tire tread and they compared that to that print—that tire tread that was in the snow. The tread was right near the shell casing. And the police will tell you that a gross examination shows that the tread is similar. The police kept having contact with [K.G.]. They needed a description of the attackers, they needed a

description of the car, they needed her to remember everything she could about what happened that night. And as they kept talking to her, she volunteered that she was not hitchhiking, she was prostituting. And she volunteered that the glass in her sock, she knew where it came from. It was from her crack pipe. But she also doesn't know how it got broken. Somehow it got—she knew that the glass—how the glass had gotten there, but somewhere in this assault, she doesn't remember being hit on the feet, but sometime during this assault the pipe got broken, and when she put her socks on and tried to run, it cut her feet. Well the police kept questioning her, you know, why didn't you tell anybody, why didn't you call the police? And [K.G.] explained that by saying, she was concerned that she was a prostitute, she thought she might be arrested for that. [253] She had a warrant out for her arrest, she had paraphernalia. And she also said, I really didn't think anybody would care if this happened to a prostitute, I just didn't think it would matter to the police. She was able to give the police a description of the men who attacked her. I described their clothing earlier. She described the driver of the car as the shorter of the two. She remembered the passenger was taller—noticeably taller. She remembered that they were both clean shaven, and she remembers that the car was clean. She knew that their hair was cut real close on the sides, with hair on top. She didn't notice any jewelry and she thought maybe they're military, they're so clean cut. The car was clean, they were clean and they were neat. She also gave the police a lot of details about the car. She told the police she was in a small red, shiny care. She remembered the back windows—pop-out windows that didn't open, with those rounded edges. She

described the windows as triangular, oval-shaped. She remembered the front door locks were the kind that when you push them down, there was still a head above the surface. They didn't go all the way in. She remembered that the interior was gray fabric, and that part of the interior of the car was black. She remembered that there was a dish console between the two front seats, and she remembered her coins being thrown to the front of the car. She remembered wires hanging from the rear view mirror, something that looked

* * * *

[338] THE COURT: I didn't hear. You mean like midnight March 23rd, early hours of March 24th, is that the midnight you're talking about? See midnight could apply to two different days.

A Yes, your Honor.

THE COURT: Okay.

BY MS. WIBKER:

Q Are we talking Tuesday night?
A I'm sorry, I'm don't know the day of week.
Q Okay. Was anyone else at the scene when you got there?
A Yes, Lieutenant . . . . .
Q Who was there?
A Lieutenant Gifford, Sergeant Bjorton (ph).
Q Are they members of APD?
A Yes.
Q Are they with the Crime Scene?
A Lieutenant Gifford is. Sergeant Bjorton (ph) is not. He is with the—he's in charge of the sexual assault unit.
Q And where did you park your vehicle when you got to the area you needed to look at?

A I parked it on the paved road that goes around the runway at the entrance to the dirt road running up to the antenna farm site.

Q Is there a reason you parked out on the main road?

A Yes, we wanted to approach the scene and damage it as [339] little as possible in approaching it, to survey it and see what evidence had to be collected prior to taking any vehicles in.

Q Did you get any kind of briefing from anyone at the scene about what was to be done that night?

A We got a briefing at the scene from Sergeant Bjorton (ph), who told was what was present what he knew of at the scene, and Lieutenant Gifford, who was in charge of our team, decided what specific evidence to collect in what fashion.

Q Did you walk around the scene that night?

A Yes.

Q Did you get a good look at the scene?

A Yes.

Q What kinds of things did you see there that were important to you and your work as a crime scene investigator?

A We saw an area of what appeared to be blood in snow and tire tracks, shoe tracks. Eventually, we found a cartridge from a gun, found several items of clothing, and a condom.

Q Were you careful to note where these particular items were located?

A Yes.

Q Were you given any particular task that night to do at the scene?

[340] A I as assigned to diagram the scene.

Q What's the first thing that you do when you diagram a scene?

A After examining the scene and deciding what needs to be diagramed, we pick a point that is preferably surveyed in by whoever—for example a telephone pole that we'd be sure was surveyed, or some other landmark that will be there in the future and is a known point, and choose that as a zero point, a point where everything else measured from.

Q Did you do that in this case?

A Yes.

Q And what did you use as a zero point?

A One of the gate posts of the gate that surrounds the antenna farm.

Q After you determined a zero point, what did you do at the scene for purposes of diagraming it?

A I took measurements from that zero point to the objects and areas that were of interest to the crime scene team.

Q After you had your zero point and your measurements, did you prepare some kind of visual aid?

A I did a rough sketch at that time, that is, a sketch drawn nowhere near to scale and put the measurements on it.

Q And did you do something later with the rough—the

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[463] and get a large bag to bag the clothes in.

Q Did you ask the person named [K.G.] to go with you somewhere that evening?

A Yes, I initially asked her to return to the scene with me and explain what happened at the scene to myself and Sergeant Bjorton, which she agreed to do. And later I took her to the hospital for an examination.

Q Now you mentioned that she was wrapped up in a blanket.

A Yes.

Q Did she agree to go out with you?
A Yes, she went to the rear of her apartment with Mr. Saraf and returned later clothed—wearing clothes.
Q Did you go somewhere that night?
A We then went to Point Woronzof to the area that Mr. Slowzar (ph) had shown me before, and we parked on the roadway and walked into the scene, and using a flashlight, she pointed out different areas of the scene.
Q And who went that night with you and [K.G.]?
A Sergeant Bjorton (ph) was also with us when we did that.
Q You mentioned that you parked outside?
A On Point Woronzof Drive, which is sort of the extension of Northern Lights, in that area.
Q Was this person named [K.G.] able to walk into that area?
A She was moving very slowly that night and it was very clear that she was in a lot of pain, and her movements [464] were very slow and deliberate as I said. She didn't want to make any unnecessary movements. When we walked in, we walked in together, like very slowly.
Q You mentioned that you got back there and she used a flashlight to show you where things happened.
A Yes.
Q Did you do anything else back there when you . . . . .
A No, we didn't walk around the scene. We probably—using exhibit number 4, we walked to the—sort of the intersection here, the main—we probably walked to approximately there, the middle of the diagram basically.
Q You finger is almost straight under the N with the arrow . . . . .

A Right.
Q . . . . . but maybe a little to the E?
A Right, and above the T-E-C, right in there. And she used the flashlight and pointed out different areas, and she pointed out (indiscernible).
Q How long do you think you were out at the scene?
A Well I think we were probably at the scene a very short amount of time. It took us a long time to walk in and out of the scene. We were probably there about 20 to 30 minutes.
Q Where did you go from there?
A From there I took [K.G.] and her boyfriend to the hospital. [465] We took her to Alaska Region—I took her to Alaska Regional Hospital. Sergeant Bjorton stayed at the scene to inform the crime scene team what she had said.
Q What time do you think you got to the hospital?
A I arrived at the hos—we arrived at the hospital at approximately midnight.
Q When you got to the hospital, what happened?
A When we got to the hospital, the—when you first go into the emergency room, which is where rape victims are taken for their examination, the victim is—has to go through a little triage area where a nurse evaluates your condition and asks you certain personal questions, and sort of gets the record work going for the hospital, and also to evaluate, you know, what—how much of an emergency this is, as compared to other things that are coming into the emergency room.
Q Did you stay in that records area with [K.G.]?
A I stayed there for a very short amount of time. I wanted to go into the emergency room and contact the physician that was on duty that night, and to explain to him what I had, and why I was there.

Q Did you see something happen in the records area that disturbed you?
A Back in the tre—as I was walking into the—where the desk is where the physician was waiting, I noticed some- [466] thing in the corner of my eye, I looked back and I saw this nurse sort of throw her hands up, and I saw the victim get up and start to walk out of the emergency room. So I walked back to see what was going on. With what had just happened, the nurse appeared to me to be very exasperated about something.
Q What did you do?
A I went over to find out what the problem was and I talked to [K.G.], and I learned that there was a problem . . . . .

MR. BUTLER: Objection, hearsay.

THE COURT: I don't know what's coming here . . . . .

MR. BUTLER: And relevance.

THE COURT: . . . . . so I don't know whether it's hearsay or not. What are you offering this for Ms. Wibker?

MS. WIBKER: We're not attempting to offer hearsay, your Honor. I can rephrase the question.

THE COURT: All right.

BY MS. WIBKER:

Q What did you observe when you contacted [K.G.]—you said she was walk—trying to walk away?
A She was trying to leave the area. She was trying to leave the emergency room.
Q Were you able to get her to come back?
A Yes.
Q And did you have to do anything to get her to stay?

[467] A Yes, I reassured her again that she was not going to be placed under arrest that night, and that if gave information to the nurse, that I would not be arresting her.

Q Did the person you knew as [K.G.] stay in the hospital after that?

A Yes.

Q Now at this point, did you know anything about who she was, other than [K.G.]?

A No, I only knew her as [K.G.]. I didn't know her full name or her date of birth.

Q When were you able to identify anything other than [K.G.]?

A In the emergency room I think—she gave that information to the triage nurse and that was the information the triage nurse was trying to obtain from her, and that information was provided, and she was taken on into the emergency room, but she apparently realized that she was not going to be arrested that night.

Q When you first heard her full name, was it when she told it to the triage nurse?

A Yes.

Q Was that after you went and pulled her back?

A Yes.

Q And what was the full name that you learned?

A [K.G.].

Q Did you stay at the hospital with [K.G.] after that?

[468] A Yes.

Q What happened after the person identified as [K.G.] went through the paperwork and processed at the desk?

A She was taken into an examination room and ultimately examined by Doctor Don Hudson, who was the on-duty physician that night. I was in and out of

that room throughout the evening. We were there for some time. I called dispatch and I asked them to respond an officer to the emergency room with a camera so I could take photographs of her injuries and I took a taped statement from her.

Q At the hospital?

A At the hospital.

Q When you say respond an officer, what does that mean?

A Send an officer with a camera over to the emergency room to contact me so I could use the camera to photograph the injuries.

Q Did you photograph [K.G.]'s injuries that night?

A Yes, ma'am.

Q You mentioned that you were in and out of the room with her. What did you see going on that night?

A She was in the emergency room. There were times when the nurse was in there asking her questions. There was times when the doctor was in examining her. There was the time when I was taking her taped statement and photographing [469] her injuries.

Q Was her demeanor any different by this time?

A She seemed to be opening up and providing more information to my questions.

Q Did you get a taped statement?

A Yes, I did.

Q Were you able to ask details, ask for a sequence?

A Yes.

Q When you assist a sexual assault victim to the hospital, do you normally request a rape protocol kit?

A Yes.

Q And why do you do that?

A The reason you request a rape protocol kit, that is an examination that takes different hairs, pubic hairs and head hairs from the victim, as well as a

vaginal swab that would be done in sort of a pelvic examination type of thing—like a pap smear. The reason for that is to collect evidence of the crime.

Q Did you do that in this case?

A Hairs were collected, but there was no vaginal examination done.

Q Is there a reason you didn't request the full rape protocol, including a vaginal in this case?

A There was a—there were two reasons actually. One reason was the information that she gave me indicated [470] that the suspect used a condom at the time of the assault, which indicated to me that there would probably be no semen from the suspect in the vagina. Further, she indicated that she had showered since the attack. She had showered frequently since the attack.

Q And why would a shower make a difference in whether or not you could find evidence?

A That would eliminate trace evidence hairs and fibers and the like from pubic combings and . . . . .

Q Do you mean it washes the evidence away?

A It washes the evidence away, basically, yes.

Q You mentioned that you got hairs. Did you get any other evidence that night?

A There was some blood taken from the victim that night.

Q And is that part of a rape protocol kit that you request, to get blood?

A Yes.

Q What time do you think you left the hospital?

A I believe it was probably around—between 2:15 and 2:30.

Q And where did you go after you left the hospital?

A I drove her by a pharmacy that was open all night to fill a prescription for pain medication, and I took her home, and then I returned to the police

station to put the rape protocol kit into the refrigerator so the evidence would- [471] n't deteriorate.

Q Is that standard to keep a rape protocol kit in the refrigerator?

A If it contains blood, it is.

Q About what time do you think you got back to your office?

A I returned to my office at 3:00 in the morning.

Q What was your next contact with the person identified as [K.G.]?

A I saw her the following afternoon. I went over with Detective Potter, who is also one of the officers that responded to the major crime scene. And the purpose of that was to re-photograph the victim and my police—I don't take photographs as part of my work, and my photographs are not necessarily as good as somebody who takes photographs on a regular basis.

Q You had taken the photographs the night before at the hospital?

A I took the photographs at the hospital and . . . . .

Q And who took photographs the next day?

A Detective Potter, Nancy Potter.

Q And would this be Wednesday, March 24.

A Yes.

Q Was there a time after that—the night at the hospital and the next day, Wednesday, wasn't there a time after that when you took further photographs of the victim?

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[624] you put it on. Do you see what I mean? Why don't you lift up that bigger box there and just let the mic hang down so it untwists. Okay.

THE CLERK: I think she's got the wrong microphone.

THE COURT: Oh, has she got the wrong mic. No, I thought she had the right one, didn't—she's got the one hooked up to the box.

THE CLERK: No, that one's for something else.

THE COURT: Oop—what's that one? Oh, I see, okay. Sorry. Okay. Now—oh, okay, good. Would you raise your right hand.

(Oath administered)

[K.G.]: I do so swear.

THE COURT: Very well. You may be seated.

[K.G.]

called as a witness on behalf of the plaintiff, testified as follows on:

DIRECT EXAMINATION

THE COURT: Please state your full name and spell your last name.

A My name is [K.G.].

THE COURT: And are you employed currently?

A I am, yes.

THE COURT: What is your occupation?

A I run a chipper, a wood chipper.

[625] THE COURT: And are you residing in the Anchorage area?

A South Anchorage.

THE COURT: All right. Ms. Wibker?

BY MS. WIBKER:

Q [K.G.], what city did you live in back in March of 93?

A In Anchorage.

Q And would you tell us what happened in Spenard back on Monday evening, March 22nd, 1993?
A I was walking down Spenard Road, going north, on the east side of the street, the Chilkoot's side, when I saw a car go by. Not wearing glasses, I wasn't quite in focus, but I saw their faces turned toward me. I know they were looking at me. And I crossed the street. They pulled a yewey (ph) and went down 25th Street by LaMex, turned another yewey (ph), came back and called to me from the car.
Q Do you know about what time this was?
A Around 9:00 I believe.
Q After the person called to you from the car, what happened then?
A Then I walked over to the car.
Q Would you tell the jury how much money you had on you that night?
A Change, probably less than a dollar.
Q And where was your money that night?
[626] A In my jeans pocket.
Q Were you carrying a purse?
A Yeah, it was a small binocular case with my makeup.
Q What color was it?
A Black.
Q And what was inside your purse that night?
A Deck of cards, some makeup, brush, small hair spray, just personal items.
Q Any kind of perfume or cologne?
A I had perfume.
Q What kind of perfume did you have?
A It was called Tride. I also had a small sampler of some type. I don't remember the name.
Q Are you referring to two different perfumes?

A The sampler was merely a small plastic thing about this big. The Tride was about three, four inches tall, with a blue top.

THE COURT: How do you spell Tribe, do you remember?

A T-R-I-D-E.

BY MS. WIBKER:

Q Can you describe the bottle of Tride perfume?
A It had a—kind of a twisted square angle and a blue top, same top, same design.
Q Do you know the color of the bottle?
A Black and blue.
[627] Q And what were you wearing that night?
A I had a layered outfit consisting of a pair of black leather boots, a pair of socks, a couple pairs of stretch pants—gray stretch pants, a pair of jeans, a shirt, let's see—two sweaters underneath a shawl collared mid-length sweater, and over the top of that was a calf-length brown sweater—brown-gray.
Q Let me just ask you some questions about your clothing. Can you tell us the colors of any of the shirts that you had on?
A The inside shirt was a gray and white stripe, thin stripe, cotton shirt. Then there was a blue—royal blue turtle neck. Then I think another turtle neck of a striped red-purple-green type thing. And both of the outer sweaters, the shawl collar and the calf length were kind of a gray-brown tweedy type.
Q What about the clothing on your legs, can you describe—you mentioned jeans and stretch pants. Can you describe them?
A The stretch pants—I had a tight pair of—there's a little hole in the crotch and some makeup stains on them. The other pair was a large pair that I had worn

when I was pregnant years ago, so they were kind of stretched out. I wore them over the top. They had little tiny holes in them, and one big hole in the knee. The jeans [628] have a stain on the rear. They're an older pair, a little bit bigger—I think an inch bigger waist than I normally wear, 29-32 is what they measure.

Q And why is it that you remember the jeans being bigger?

A Because they are always baggy and I wore them so I could layer them over other clothes.

Q You mentioned they have a stain on them. Was that there when you left home that night?

A Uh-hmm (affirmative).

Q And where was that stain?

A On the seat.

Q What color were the socks that you had on that night?

A They were unmatched. I believe a white and a blue.

Q. Did you have anything on your head?

A A ball cap.

Q When you say a ball cap . . . . .

A A baseball hat.

Q And you mentioned that you walked up to the vehicle?

A Uh-hmm (affirmative).

Q And what happened when you walked up to the vehicle?

A They asked me if I wanted to make some money.

Q What did you say?

A And I said, yeah, how much? And they offered me $100.

Q And that was for what?

A Oral sex.

[629] Q Did you agree to that?

A Yes, I did.
Q What happened after you agreed to that?
A Then the passenger opened the door and got out and asked me to get in the back, and I did.
Q After you got in the vehicle, did the vehicle go somewhere?
A They made a right on Spenard and began to go south.
Q You said they made a right on Spenard. How long . . . . .
A Cause they were still on 25th at the time.
Q At any time, after you got in the vehicle and the agreement was made, did you suggest somewhere to go?
A Yes, I had a suggestion to go down by the Spenard Rec Center. I said just keep going straight on Spenard. They ignored me and just made a right on Northern Lights and continued west.
Q What was it about Spenard Rec Center, that you would suggest that as a place to go?
A The reason being, it's a small wooded lot where if I was in trouble I could scream for help. There's houses surrounding that. It's a small, wooded lonely little place, but it's still within reach of civilization, and I feel it—kind of felt that'd be kind of safe there.
Q You mentioned they turned south off of Spenard onto Northern Lights?

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[634] Q Were you trying to do anything by saying don't get upset?
A Trying to mellow them out without being in a patronizing tone to where they would get even more pissed off.
Q What happened after they did that, after you tried to calm things down?

A Well then they wanted my purse. They wanted my money. So I gave them the money that I had in my pocket, which was a bunch of change they threw on the console. And they went through my purse.

Q Did you see what they did when they went through your purse?

A They just grabbed handfuls of stuff and looked at it, dug through the bottom, dumped out stuff in their lap, and then crammed it back in. There wa obviously no money or anything of value.

Q Were you ever given your purse back?

A They set in the back seat and told me to get naked at that point.

Q And did you do that?

A Yes, I did.

Q And what happened . . . . .

A And as I handed them my clothes, they went through it looking for money or whatever.

Q You were in the front, handing your clothes where?

A To the driver and the passenger. They were both search- [635] ing.

Q What did they do with your clothes after they searched through them.

A Piled it in the back seat.

Q What happened after they searched your clothes?

A Then they took my sweater and spread it on the passenger seat.

Q Did you notice anything about the passenger seat?

A I noticed there was some kind of strange looking stain in the center.

Q And what happened after your sweater was spread on the passenger seat?

A Then the driver requested oral sex, so I got out a rubber, and he said, no, I don't want you to use that.

Q Where was the gun?
A The passenger was holding the gun real close to me from the back seat. It's like he enjoyed playing with it.

MR. BUTLER: Objection, speculation.

THE COURT: Overruled.

Q What did the driver do when you asked him to use the condom?
A He refused. And the passenger at that point said, look, if you even graze him with your tooth, pull a hair, you're gonna be one dead bitch.
Q Did you do what the driver . . . . .
[636] A I complied.
Q What happened after you did what the driver wanted?
A As I began giving him oral sex, the passenger opened the door, slid out, and then pushed his way in next to us, behind me. He took one of my rubbers and put it on and penetrated me vaginally from the rear while I was giving oral sex to the driver.
Q And were you on your stomach or your back?
A On my side between the seats, kind of keeping the sweater under me—kind of—I was a little bit on the passenger seat on the side of my hip, kind a.
Q And where was the gun when the passenger moved to the front?
A He kept it.
Q Did the passenger require any kind of sex?
A The passenger was penetrating me vaginally at that time.
Q Did he penetrate you—well what did he penetrate you . . . . .
A From the rear.
Q What did he penetrate you with?
A His penis.

Q Anything else?
A Also with his fingers.
Q What happened after the passenger penetrated you?
A Then the driver came. And he asked me ingest it, which I [637] pretended like I did. Actually, I just spread it away from me and . . . . .
Q When you say came, what do you mean?
A He ejaculated.
Q And what happened after that?
A Then the passenger pulled out. They had the dome light on the whole time. They enjoyed watching each other.

MR. BUTLER: Objection again, speculation.

THE COURT: Overruled.

A And they spread my legs and the driver wanted to get a good view of what was going on, and he puts his hands on me, and the passenger came forward between my legs and penetrated me again until he came in a short period of time.

BY MS. WIBKER:

Q An where was the gun during this time?
A At that time, then the driver was hold it.
Q And how did the gun get from the passenger to the driver?
A The passenger handed it to him.
Q And when was it that it was passed?
A After the driver's ejaculation.
Q What happened after the passenger ejaculated?
A Then they had a good laugh.
Q And what were you doing during that time?
A Sitting there, cleaning myself as good as I could, and [638] keeping an eye on where my clothing was, and saying, okay, look, now, you know, would you

please give me a ride back to Spenard, and we'll just forget about this, and all this. And the passenger asked me to get out of the car and lay face down in the snow.

Q Do you remember what his words were?

A He said, get out of the car, bitch, and lay down in the snow—face down. I said . . . . .

MR. BUTLER: Face down—which one did you say said that?

A The passenger.

BY MS. WIBKER:

Q What happened after the passenger told you to lie down in the—lie face down in the snow?

A I said what, you're gonna kill me now? And he says, oh, no. And they asked me if I had any kids, and I told them I did. And I said, look, I'm a good person. I've never done anything to hurt anyone. I may not be perfect, but I don't deserve this. And while I was talking to the driver, who still had the gun in his hand, he said, get out of the car, bitch, and hit me with the gun.

Q Why were you saying those things to these people?

A I was trying to appeal to any shred of humanity that must be there somewhere, or so I hoped, at the time.

Q When the driver hit you, what part of your head did he [639] hit you?

A In this area.

Q And what happened after you were hit in the head with the gun?

A I grabbed my clothes and I hightailed it. I got—no wait—I got—I grabbed my clothes and I got—I was sitting there. The door was open—the passenger door was open. And I was sitting there and the driver

had come around, like he was somewhere over here, and the passenger . . . . .

Q Was he out of the car? I'm sorry, was he . . . . .

A He was out of the car. Said something to the passenger, who was standing in front of me, something like, choke her—it started with a B, whatever he called him. So at that point, the passenger came in with something like this around my neck and choked me, choked me hard, and I was trying to wiggle out. I was trying to make my neck as strong as I could, and with my chin in there, and in the process, I shit the car. And I was so scared, I lost control.

Q And were you in the car when this happened?

A Yeah, I was sitting like this, you know, and the door was open now.

Q Which side?

A On the passenger seat.

[640] Q And was the passenger in or out of the car?

A The passenger was standing in front of me, with my head in a lock hold.

Q And were you face to face?

A Yeah—although he come in a bit from the side to grab me like that.

Q The passenger was to which—on—from using you, which side of you was the passenger on?

A A bit to my right.

Q What happened—where was the gun at the time?

A I believe the driver had it.

Q And what happened after you defecated in the car?

A Pardon?

Q What happened after you defecated in the car?

A He called me a bitch again, and grabbed it, the shit, with his hands, he scooped it up and he rubbed it against my face and my hair, you know, against my clothing.

Q And you said he, who—which . . . . .
A The passenger.
Q What did you do after that?
A As soon as he backed away from me, I grabbed everything I could find of my clothing and ran to the end of the parking lot by the pile of snow and began putting on my clothes.
Q You said you grabbed for your clothing. Where did you

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[655] courtroom in some proceedings that were held during the recess, to not to be conversing, even in whispers with one another. That does not apply to counsel and other people, including clients at counsel table. I'm not seeking to stop them from conferring with one another. I just don't want any possible distractions in the back of the courtroom among the spectators. Any questions about that?

MS. BILLINGSLEA: No, sir.

MR. BUTLER: No, sir, Judge.

THE COURT: We'll proceed then with further direct examination from you, Ms. Wibker. You may proceed.

[K.G.]

previously sworn, called as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION CONTINUED

Q [K.G.], I think I was asking you questions about the what happened with the bat. Who hit you with the object that looked like a bat to you?
A Pardon?
Q Who hit you with the . . . . .

A First?
Q Sure.
A The passenger.
Q And where were you when the passenger hit you?
A I was still trying to finish dressing in the corner of [656] the radar site lot.
Q And do you know about how many times the passenger hit you with the bat?
A All together between them around 20 times, at least, as I ran from the corner—from the corner of the lot where I was, through the lot, and around the corner in trying to get down the road. I got just a short piece down the road before I went down.
Q When you said between them 20 times, was does that mean?
A Because I believe that they were handing it back and forth and they were both hitting me with it, especially at one point when I went down, the driver had the bat at that time, and he was jabbing the bat between my legs.
Q Let me back up a little bit and ask you, do you recall having any problems running?
A Yeah, it was hard to run when I was being hit with a bat. It hurt a lot. And when I got hit in the head, it like stunned me a little and knocked me off balance, but I was able to keep on my feet until then.
Q Do you remember pain anywhere else when you ran?
A My side and my knees, my arms.
Q Do you know if you had anything on your feet at this time?
A Yeah, when I first put my foot in there, I realized there was broken glass.
[657] Q What happened when you tried to run?
A It cut my foot.
Q Did you know why there was glass in your sock?

A Well I figured the pipe had busted, but it was in such small pieces that it had to have been crushed.
Q And when you say pipe, what are you referring to?
A Cocaine pipe.
Q And did you know how that had gotten in your sock?
A I put it there.
Q You mentioned earlier being down at some point and the driver having the bat. Can you describe to us what you're referring to when you talk about being down and the driver having the bat?
A Well I fell down and I rolled over on my back cause I was like trying to protect myself, like this, and my knees had come a little bit apart and they jammed—or he jammed the bat down in between them and started pounding like—well my pubic bone, I mean my vaginal lips, you know, pounding down there. I mean, I was wearing jeans, but it was he was symbolically trying to enter me with the bat, and then they were laughing while they did it.
Q When you say pounding, what was the bat pounding on?
A On my vagina covered with the jeans—my lips. It kind of spread my legs open and, you know, my lips at the same time.
[658] Q And can you describe for the jury what the position of what—of the bat—what was the position of the bat when you felt the pounding in your . . . . .
A Like if this is my legs, the bat was coming straight in, like that.
Q After you felt the pounding of the bat, what happened then?
A Well I was—I rolled over on my side and I was kind of curled up into a fetal position and I was protecting my head like this, and I was laying on my

side, my knees pulled up, and I was kind of peeking out between my elbows like that.

Q Do you remember what side you were laying on?

A On my right side. And at that point, I heard the gun go off again and I heard some—I felt something strike my head, and I had—well they had landed some more blows with the bat—excuse me let me back up before the gun went off. They had landed a good enough blow to the back of my head to where I figured I could go limp and play dead. Then the gun went off. And I laid there and tried not to breathe and they immediately started patting me, covering me up with snow, grabbing handfuls and packing it over me real quickly. And then they kind of backed off and they were shuffling around, I assume looking for the shell, and they stood there for a minute, and then [659] one said to the other one, do you think she's dead? And the other said, well if she ain't, she will be soon. And then that's when they got in their car.

Q You mention that you were down like curled up.

A Yeah.

Q When you heard the shot?

A Uh-hmm (affirmative).

Q Could you see where the shot came from?

A It came from the passenger who was wearing a blue sweat suit. I could see his legs, I could tell from where it came.

Q Could you tell . . . . .

A The driver did not handle the gun like the passenger did.

Q Could you tell about how far—or where the two men then—the driver and the passenger?

A Standing about three, four feet away . . . . .

Q Where they . . . . .

A . . . . . right in my line of vision. If I'm laying like this, I could see them right out there, their legs.
Q Do you know which direction was your head facing?
A West.
Q Were they toward your—or, you're peeking out through your arms, you're on your right side with your head facing west, and what could you see?
A I could see their legs over here.

* * * *

[666] Q You mentioned that the police came and you were kind of angry with them at first, but then you decided that you would work on—work with them on the investigation. Did you give them a taped statement of what happened?
A Yes.
Q Did you give them several?
A Yes.
Q Do you remember was there a time when you corrected some of the things you had said before?
A Yes, cause I decided that I might as well come clean with the fact that I was working and that I had the cocaine pipe in my sock.
Q And what do you mean when you say working?
A As far as prostitution.
Q And what had you told the police before that?
A Well I denied it.
Q But had the police asked you what you were doing that night in Spenard?
A Well no, what I mean, I just didn't say that. And I think later on she may have asked me if I was working and I denied—or if she asked me if that was my pipe and I denied it, until finally I decided that was just ridiculous, you know, and if I'm gonna do this, I want to do it right, you know, it's like a job to do.

Q And what is—what do you mean when you say working?

[667] A Working as far as the oldest business in the world, prostitution.

Q After you get—you went to the hospital with the police and you gave them some taped statements, did you try to give the police information to do the investigation?

A As far as what do you mean?

Q Descriptions of the persons, the vehicle?

A Oh—oh, yeah. I went to the crime lab and there was an artist there who drew pictures that were—they were okay. It was hard to do. I was in a lot of pain at the time and it's difficult to have one person draw what's in your mind. But the description of the car was pretty close and it seemed to work.

Q What do you remember about the vehicle that you were in that night, do you remember the things you told the police about the vehicle?

A Yes, it was a red, two-door, foreign car.

Q Do you remember the size?

A Small.

Q What did you notice about the condition of the car?

A It was pretty clean, in pretty good shape. The stain on the seat wasn't dirty, it'd been there before. Excuse me.

Q Which stain are you referring to?

A On the passenger front seat. There was a radar detector.

[668] Q And where was the radar detector?

A On the front left visor I believe.

Q Front—when you say front left visor, what part of the car are talking about?

A Like to the left of the mirror. It was red, and there was little pop-out back windows. That's about all I remember?
Q Did you remember anything about the interior?
A A gray upholstery, a dish console between the two front seats.
Q Did you see anything else around the area where the radar detector was?
A Did I see anything else—I don't understand.
Q Anything you remember telling the police about that was in that area by the radar detector?
A All I remember is showing them where I'd lain in the snow where the blood was. I showed them the tracks where we pulled in. I showed them where I'd gone and dressed. I showed them the track where I ran and where I went down. I showed them where my purse had gotten thrown out where they dumped my stuff. And then they kept some stuff in the car though.
Q When you say your purse thrown out . . . . .
A My binocular case.
Q Are you talking about in the car?

* * * *

[671] it a little easier, but I didn't really need them. The car was close enough to where I could see well enough. It's distance that I have a problem with.
Q How close were you able to get to the car?
A Well I could get right up against the glass. I couldn't touch the car, but . . . . .
Q Were you instructed not to touch the . . . . .
A Yeah.
Q How where you telling—how were you showing the police the things that you were looking for?
A I was taking the flashlight and, you know, angling it and showing them things, you know,

pointing out things with the flashlight and going around the car and taking all different kinds of angles to get to this view.

Q Were you looking for something in particular that might help you be sure?

A Yes, I was just looking for my stuff and for stains, things like that.

Q Any particular kind of stain you were looking for?

A For the shit on the seat, I was looking for that, and for blood.

Q Do you know if bled in the vehicle that night?

A I believe I did when I was struck with the gun.

Q Did you see a stain that helped you make a determination as to whether or not this was the vehicle.

[672] A Yes, I did. There was a brown stain on the passenger seat and I could see it pretty clearly.

Q And were you using the glasses when you saw that?

A Uh-hmm (affirmative).

Q What was your conclusion that night about whether or not this was the vehicle?

A I was absolutely sure without a doubt.

Q Would you describe for the jury, the person you remember as the driver of the vehicle that night?

A He's sitting right there.

Q And would you describe for the jury . . . . .

MS. WIBKER: I'm going to ask the record to reflect that [K.G.] is looking directly at the person on the far left of the defense table?

THE COURT: She looked directly at defendant Jackson.

BY MS. WIBKER:

Q [K.G.], could you describe for the jury who the passenger was in the vehicle that night?
A That's him, sitting right there.

MS. WIBKER: I would ask the record to reflect that . . . . .

THE COURT: I can't see who she was looking at there. Are you talking about the person next to . . . . .

A This person here between the two attorneys.

THE COURT: With what color shirt?

A The blue stripe.

[673] THE COURT: She has identified defendant Osborne.

BY MS. WIBKER:

Q Could you tell the jury what the driver was wearing on the night of the assault?
A He was wearing blue jeans, ball cap, some kind of sweat shirt with a design on it. The . . . . .
Q Do you remember—I'm sorry.
A The passenger was wearing a blue—navy blue hooded sweat shirt. I believe the driver was probably in tennis shoes and the passenger was probably wearing boots, but I'm not sure on those two things about the footwear.
Q Do you recall the color of the driver's sweat shirt?
A Mostly blue with like orange and white stuff, maybe green, I don't know, it was just some kind of pattern.
Q And what did their hair look like on the night of the assault?
A Shaved around the back and sides, crew cut on top, basically military.

Q Was there a time when you were asked to look at some line-ups at the police department?
A Yeah.
Q Do you remember how many line-ups you looked at?
A I looked at three—well they gave me two. They told me to look for a suspect in each one. I found the driver in the first and I didn't find anyone in the second group.

* * * *

[710] A That's right.
Q And you weren't wearing any other pair of glasses?
A No.
Q You weren't wearing contact lenses?
A No.
Q And you need them today, right?
A I can always help with my vision, however, you can also—I am not totally blind without them.
Q Right. When you take them off, you can see some things.
A I can see.
Q You told the grand jury that when you were describing the vehicle coming toward you, Mr. Mills' vehicle coming toward you, I don't see very good because I don't have my contacts in—although I don't see very good because I don't have my contacts in, I realized the headlights were from the larger vehicle.
A That's right.
Q And later in that same statement when you were describing what the inside of the car looked like and certain items that you saw inside the car, do you remember doing that?
A Yes.

Q Do you remember say—telling the grand jury that, it seems like things are distorted at a time like that?

A You're under a lot of stress at a time like that . . . . .

MR. LINTON: Page reference?

[711] MS. BILLINGSLEA: Page 35.

MR. LINTON: Thank you.

A . . . . . however, it was a minimal amount of distortion.

BY MS. BILLINGSLEA:

Q But you said to them that it seems like things are distorted like that—at a time like that?

A That's what I said.

Q On March 24th, you described the passenger of the car to Detective Branchflower, do you remember doing that?

A Yes.

Q And you described him as being six feet tall?

A I was guessing at his height, not having a ruler.

Q I'm asking you how you . . . . .

A That's right.

Q . . . . .described him to the police officer. Your description said—included his weight and you estimated his weight to be 180 to 190 pounds, do you remember?

A Yes.

Q You said he was clean shaven?

A Yes.

Q And you said he had a short shave on the sides and back of his hair?

A Yes.

Q Longer on top?

A Yes.
[712] Q You described him as a black man?
A Right.
Q He wasn't wearing any jewelry that you saw?
A Right.
Q On March 26th, you went to look at, or you went to help Mr. Weaver draw a composite drawing, do you remember doing that?
A Right.
Q You described to him what the man—who attacked you—the passenger who attacked you looked like?
A Yep.
Q And he drew the drawing, right?
A Right.
Q I'll show you what's marked defendant's A-O. Is that the drawing that you helped Mr. Weaver draw?
A Yes, I told him that it was not exact, but he did the best he could.
Q It was a composite drawing done by a police artist?
A That's exactly what it is.
Q Then sometime later, you were asked to look at two line-ups, remember that?
A Right.
Q And then after that, and you described doing that yesterday for us?
A Right.
[713] Q Sometime after that you were asked to look at a third line-up. Do you remember doing that?
A Right.

MS. BILLINGSLEA: Let's see 72 and 73 please?

BY MS. BILLINGSLEA:

Q I'm going to show you what's marked plaintiff's 72 and plaintiff's 73. Do you recognize those?

A Yes.
Q 72 is the line-up that you looked at, right?
A Right.
Q On the yellow sticker? And 73 on the yellow sticker are the notes that were taken at the time you did the identification, is that correct?
A Right.
Q Would you mind reading to the jury, what your handwritten notes on plaintiff's exhibit 72 say?
A It says, initially number 4 struck me because of the nose. Numbers 5 and 6 are the most familiar all together, but number 6 is the most likely.
Q So you picked number 6 as being the most likely?
A That's the one that I chose.

(Pause)

Q Now you've recently, I think in September got that new pair of glasses, is that right?
A That's right.
[714] Q You got them in preparation for this trial?
A That's right.
Q You had had a prescription done before though, is that right?
A Yes.
Q You had your eyes examined in like 1990?
A Yeah.
Q May I have a blue sticker please? I'm going to show you defense B-O. Is that you name at the top of the page?
A Yes.
Q Is this your vision record from the eye doctor?
A I don't know. If they say it is, then it must be.
Q Do you remember going to the eye doctor in September of 1990?
A Y...

Q On this record here, is that your name and address?
A Yes.
Q Or your address as it was back then. Do you remember having gone to him?
A Yes.
Q You went to a different eye doctor in September, is that right?
A Yes.
Q Who did the bill go to?
A The Crime Compensation Board.

* * * *

[734] there's—that's not—well isn't it true that the bat would have to come from this position straight . . . . .
A No, that's not true.
Q . . . . . in order to be . . . . .
A I suggest you get a picture of a woman's anatomy and it'll make it a little clearer.
Q Okay, all right. Now when you said it was a symbolic gesture, that was something you added to the story, wasn't it?
A That's what it appeared to me at the time.
Q Okay, a symbolic gesture . . . . .
A And it still seems that way.
Q Okay. Now when you first got home, you talked to the gentleman at your house, what's his name?
A Greg Saraf.
Q Okay. You told him that you had been raped, beaten and left for dead. That was the first statement you made, wasn't it?
A Raped, beaten, choked, shot, and left for dead.
Q Okay. And he examined you, examined your head, saw this injury, and then isn't it true that then you decided, oh, I've been shot?

A No, that's not true at all.
Q Well this injury, the hair—your hair was still there, right, on that injury?
[735] A I'm missing an amount of hair.
Q All right, but what I'm saying is if the bullet went through there, it probably would have—well I'll chuck that question. You were examined by a pathologist, did you say?
A Yes.
Q Okay, and what stage was the wound in when he saw it, of the healing stage?
A I'm really not sure exactly of when the date was.
Q You testified before the grand jury, didn't you?
A Yes.
Q Now on that particular night, it's fair to say that you were a working woman, right?
A I had committed no crime at the time.
Q Okay, but when I say working, you were, quote unquote "looking for a new client in the oldest business in the world."
A Uh-hmm (affirmative).
Q All right, so you were essentially holding yourself out for hire that night?
A I was thinking about it. I make no decisions until I make them.
Q All right, now would you agree with me that a working woman outside who is quote unquote "looking for a new client in the oldest business in the world," you know, [736] you're waving at cars?
A No.
Q Well would you agree with me that merely walking on Spenard near Chilkoot's—Chilkoot's is a club, isn't it?
A That's right.
Q And it's 9 o'clock or so in the evening, so people are frequenting the club, right?

A Right.
Q So if a person—excuse me, if a person sees a woman walking in the area of Chilkoot's, there's no way to assume that that woman is a working woman?
A That's right.
Q And—unless she's waving at cars as they go by?
A I didn't do that.
Q Well if you were—now when I say—well let me quote you. Now you said you were working. What do you mean when you say you were working is the question that was asked of you at the grand jury. And your answer was, "well I was looking for a new client in the oldest business in the world" quote unquote—page 12.

MR. LINTON: Of the grand jury book.

BY MR. BUTLER:

Q So now you were actively looking for someone, right?
A I was thinking about it.
[737] Q So then what . . . . .
A I was walking. I was thinking about it.
Q So then you were not looking for a new client. You were just basically walking and thinking well maybe I'll look for a new client.
A Walking and thinking is looking. It is not doing.
Q And so out of nowhere, out of all of the people that would be walking in the area of Chilkoot's that evening at that hour, it's your position that the driver and the passenger just happened to drive up to you and say do you want a ride, right, is that what they said?
A Do you want to make some money?
Q They asked you do you want to make some money. So there was no way for the passenger and the driver to know that you were a working woman,

and it's your testimony they just simply drove up to you on the street and said to you, do you want to make some money?

A It's my testimony they drove past, they made a yewee and drove down 25th and made another yewee, then they called to me from the car.

Q So without knowing and without having any indication from you that you were a working woman, they just made a good educated guess that you were a working woman?

A That's right.

Q Now you have nothing to lose by telling the truth here do [738] you?

A Not a thing.

Q Now when they drove up, you said, well darling, I'm working, what's up, right?

A When they called to me and they said do you want to make some money, I said yes, I'm working, what's up—darlings, or whatever I said.

Q Isn't it true . . . . .

A That I said I said . . . . .

Q Oh, I'm sorry.

A . . . . . that's what I said.

Q Okay, but isn't it true you told the grand jury, I said—page 13, line whatever it is, I said, well darlings, I'm working, what's up?

A After they had already called to me from the car.

Q Okay, well . . . . .

A They approached me first.

Q All right. Now even if you said first, well darlings, I'm up—I mean, I'm working, what's up, you don't expect anything is going to happen to you, right?

A That's not the point.

Q So there's no need for you to . . . . .

A The point is the truth of the matter.

Q Okay. What I'd like to do is hand you a copy of the grand jury and perhaps you will help me by referring to

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[753] Q And it went to the lab to find the semen that you said you wiped on it, didn't it?
A Right.
Q Do you know whether or not there was any semen on that sweater?
A I don't know if there was or not, but I probably wiped more of it on the seat than just whatever, just away, so that I wouldn't get it in my mouth.
Q But isn't it true you specifically told them that you wiped it on the sweater?
A And among other things.
Q But you told them the sweater?
A Among other things, yes.
Q And then you said while you were doing oral sex with the driver, the passenger was watching. He was watching from the back seat.
A Right.
Q No in order to do oral sex on the driver in a car the size of a Nissan Sentra, you were—you had to be on the passenger seat?
A Right.
Q And then you testified that the passenger was watching and then he decided to come up front.
A Right.
Q So when he decided to do that, he must have interrupted [754] what was going on in the front seat?
A Right.
Q Okay. And you also said that he got into the car with you all and started having sex with you from the rear?
A Right.

Q Now isn't that sort of impossible in a Nissan Sentra?
A No, it's not.
Q Wouldn't he have to been outside in order to—I mean—how tall are you?
A 5'6".
Q All right. And so we know that the driver had to take up all of the driver's seat, right?
A We were all three squished (sic) [squashed] in the front seat. I was between them somewhat on—my hip was somewhat on the passenger seat and my arm and elbow was somewhat in the driver's seat.
Q But isn't it true physically that it's probably . . . . .
A No.
Q So the passenger took the condom and put it on, right?
A Yes.
Q And then he had sex with you.
A Right.
Q Now, and I think you told police that they ejac – they came pretty fast?
A Right.
[755] Q Okay. And I think you also—now it's your—they put the sweater down under you, right?
A On the dri—on the passenger seat.
Q So now if you're going to be doing oral sex, then why would there be a need to put a sweater down under you on the passenger, if you all are not working together at this point?
A They put the sweater down.
Q But isn't it true that you don't really need a sweater on the passenger seat if you're going to be performing oral sex on the driver who is sitting in the driver's seat?
A That doesn't really have any bearing on it. It was their car, that's what they wanted to do. I don't know

what went on in their minds and I really, you know, don't care.

Q But isn't it true, ma'am, that at this point when you're deciding what position, who was going to be in, that the sex is consensual?

A No, it was not.

Q Well when did the sweater go on—under you?

A When the passenger came up front.

Q But by that time you were having oral sex with the driver?

A Yeah.

Q But I thought you told police that the sweater was put

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[812] buddy before we take you home or something to that effect, and (indiscernible—poor recording).

Q Okay. Now you told the—Detective Branchflower in this interview that there's semen on my sweater from that, meaning the oral sex with the driver, there was semen on your sweater. You told her that didn't you?

A I'm sure I did, yes.

Q Okay, now did they tell you anything about the lab report on the sweater?

A The didn't find anything as far as I understand.

Q Now could that be because the sex at this point was consensual and willing, and not what you testified here that you did it reluctantly or under threat of injury?

A No, not at all.

Q This sweater had not been washed before you gave it to Detective Branchflower, right?

A That's right.

Q And so anything that was on the sweater at the time you were in the car, should have still been on the sweater at the time you were . . . . .

A It should have been, but I was running in the snow, and who knows how much got on the sweater instead of on the seat or on his clothing when I was smearing it away.

Q You know why they do lab tests like that, don't you?

A Yes.

[813] Q To, you know, to try and, you know, get other evidence to support your testimony, right?

A Right.

Q Now you had the rubber that was given to the passenger to use for vaginal sex, didn't you?

A Yes.

Q You gave him the rubber?

A He took it from the dash where the driver had put it after refusing to use it.

Q Okay, so it was there and he used it and you didn't give it to him?

A No.

Q Now you told Detective Branchflower that after they pulled out the gun, they took your purse from you and they searched it. Now is it—so if they've taken your purse from you and searching it before the sex is happening, could they have gotten that rubber out then?

A That rubber was in my back pocket.

Q Okay. And you also told Detective Branchflower that while they searched your purse, they took my knife out of my pocket?

A No, they already had the knife.

Q But you told her that you—well, page 2, counsel. Now you told Detective Branchflower that they pulled out the gun and they searched and they took

the knife from your [814] pocket, isn't that what you said?

A That's what I said, but what . . . . .

Q So is that not true?

A I was under a lot of pain at the time. They already had the knife. This is not, sir, this is not what happened right here.

Q But it is what you told her, right?

A Right.

Q And, of course, if you tell her these things, she's going to rely on them in the course of her investigation, right?

A Right. Well it's a human mistake, and that one was mine.

Q Pardon?

A It was a human mistake and that one was mine.

Q Okay.

MS. WIBKER: Your Honor, under Evidence Rule 106, in the interest of completeness, I would ask that the witness be required to read this statement that she made to Detective Branchflower.

MR. BUTLER: Which one and which part of it. I mean we've got lots of statements here.

MS. WIBKER: The line that defense counsel was referring to on page 2 of the interview on 3-24, I would ask that . . . . .

MR. BUTLER: Show me. Okay. I'd like to have her read it, Judge.

* * * *

[926] THE CLERK: Court is in session.

THE COURT: You may be seated. We're continuing in State versus Jackson and State versus Osborne. Defendants, counsel, all jurors are all present. We

have a new witness on the stand. Sir if you'd stand and raise your right hand?

(Oath administered)

MR. ECKER: Yes, sir.

THE COURT: You may be seated.

MATTHEW K. ECKER

called as a witness on behalf of the plaintiff, testified as follows on:

DIRECT EXAMINATION

THE COURT: Please state your full name and spell your last name.

A My full name is Matthew Kenneth Ecker. Last name is spelled E-C-K-E-R.

THE COURT: And your occupation?

A I'm a military police officer on Fort Richardson.

THE COURT: Thank you. Mr. Linton?

BY MR. LINTON:

Q How long have you done that kind of work, sir?
A Approximately a year and a half, sir.
Q I'll show you what's been admitted as exhibit 66, a red Swiss army knife. Seen that knife before, sir?
A Yes, sir.
[927] Q Did you see it in the early morning hours at about 12:30 on March 28, 1993?
A Yes, I did.
Q Where were you at the time, sir?
A I was on a traffic stop on Richardson Drive adjacent to Quarter Master Road.
Q And where did you find that knife?
A I found the knife in the pants pocket of the driver of the vehicle I had stopped.

Q What was his name?
A His name was Dexter Jackson.
Q Would you show us on the pants that you're wearing, where it was that you found the red Swiss army knife?
A Yes, it was in his pants pocket right here.

MR. LINTON: Pointing to the right front pocket, your Honor.

THE COURT: Yes. The record will reflect that.

BY MR. LINTON:

Q Let me ask you some questions. What was your job that night, that is, in the early morning hours of March 28th, 1993?
A My job was a patrolman. I was to respond to any incidents that occurred and to enforce traffic regulations.
Q Were you alone or were you with someone else that night?
A I was with a partner.
[928] Q What was his name?
A His name was Specialist Briggs.
Q And . . . . .

THE COURT: Briggs, did you say?

A Yes, your Honor.

THE COURT: Thank you.

BY MR. LINTON:

Q And while you were traveling, were you travel—were you in a vehicle?
A Yes, I was.
Q Would you describe it for the jury?
A My patrol vehicle?
Q Yes, sir.

A It was a patrol vehicle, a four-door sedan with lights on top, standard police vehicle.
Q Is it marked somehow so that one could identify it as a military police vehicle?
A Yes, it has the lights.
Q At some point that night did a vehicle come to your attention while you were working?
A Yes, it did.
Q Tell the jury what you saw?
A I observed a red in color Nissan Sentra. It was flashing its headlights at a vehicle in front of it multiple times. How far do you want me to . . . . .
[929] Q Well go ahead. What happened when you saw the vehicle flashing its lights?
A We stopped the vehicle on Richardson Drive and Quarter Master Road, and I approached the vehicle on the driver's side, and Specialist Briggs approached on the passenger side. I asked the driver for a driver's license, registration and military ID card. He gave me a driver's license and a military ID card. I asked him for a registration and he said I don't have one, but I have a title, and I asked if I could see it. He opened the glove compartment and Specialist Briggs said that there was a gun in the glove compartment, and then had both occupants exit the vehicle.
Q What did you do when the driver exited the vehicle?
A When the driver exited the vehicle, there was a patrol that rolled up behind us and PFC Cherabino (ph) came up and assisted me and took the driver to the rear of the vehicle.
Q And when you got to the rear of the vehicle what did you do with the driver?
A The driver was put in the prone position.
Q And when he was in that prone position what did you do?

A I later searched him and then he was placed in handcuffs.

[930] Q In the search, you found what, sir?

A I found this Swiss army knife.

Q Let me ask you some questions about the sequence of events. What was it that first brought your attention to the red Nissan two-door?

A Just the flashing of its headlights at the vehicle in front of him.

Q Once or more than once?

A More than once.

Q Explain how that happened, sir?

A He—we were behind the—behind their vehicle and we just—I was just watching it and I saw them flash their headlights a couple times and then they turned onto a different street and they flashed their headlights again at them.

Q Was another vehicle involved? There was your vehicle, the red Nissan, was there another vehicle?

A There was a vehicle in front of him, a small pickup, is all I remember about it, and they were flashing their headlights at them.

Q Did you call it to anyone's attention when you saw it?

A Yes, to Specialist Briggs' attention.

Q And after you called it to his attention, what happened?

A I told him I was going to go ahead and stop the vehicle and we stopped them.

[931] Q Did the flashing occur after you called it to Mr. Briggs' attention?

A No, I don't believe so.

Q Tell us how you went about making the stop?

A Well we simply just turned on the lights, the vehicle pulled over almost right away, and we called in the stop and notified the dispatcher that we were

stopping a vehicle and the description of the vehicle, and we then approached the vehicle.

Q Which side did you approach on?

A I approached on the driver's side.

Q Back up a second. While you were riding in your patrol vehicle, where in your patrol vehicle were you?

A I was in the passenger seat.

Q Who was driving?

A Specialist Briggs was driving.

Q When you got out, which side did you approach the vehicle that you had stopped, the red Nissan, on?

A On the driver's side.

Q On which side did Specialist Briggs approach the vehicle that you'd stopped?

A The passenger side.

Q Now when you got to the driver's door and asked for a registration, what did the driver do?

A Well the first time I asked for a registration, he didn't

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[939] excused.

A Thank you, your Honor.

(Pause)

THE COURT: Raise your right hand please.

(Oath administered)

MR. BRIGGS: I do.

THE COURT: You may be seated.

BRAND LEE BRIGGS

called as a witness on behalf of the plaintiff, testified as follows on:

DIRECT EXAMINATION

THE COURT: Please state your full name and spell your last name?

A Brand Lee Briggs, B-R-I-G-G-S.

THE COURT: How do you spell your first name?

A B-R-A-N-D.

THE COURT: And your occupation?

A I'm a military policeman at Fort Richardson.

THE COURT: Thank you. Mr. Linton?

BY MR. LINTON:

Q How long have you done that kind of work, sir?
A I've been a military policeman up here for just over a year, sir.
Q And have done it elsewhere?
A Not law enforcement.
[940] Q How long have you been in the Army all together?
A Three years, sir.
Q Let me show you what's been marked as exhibit 70 for identification at this point.

THE COURT: Did you say 70?

MR. LINTON: Yes, your Honor, 70.

THE COURT: Thank you.

BY MR. LINTON:

Q On the 28th of March of this year at about three—30 minutes after midnight, 0-0-3-0. Did you see something like that, the thing that's in front of you?
A Yes, sir, I did.
Q Explain to the jury how you came upon such a think?
A Okay sir. Myself and my partner, Ecker, were patrolling. We saw a vehicle. We made a traffic stop on the vehicle. We called it in. My partner ap-

proached on the driver's side. I approached on the passenger side of the vehicle. My partner made—started talking with the driver. My job, being on the passenger side of the vehicle, I kind of look at the vehicle. It was at night. I used a—my flashlight, kind of shined it in the car, checked on the floor, on the back seat, etcetera, for any contraband, anything that's not supposed to be there. When my partner asked to see the individual's driver's license and registration, which is standard procedure, the driver of [941] the vehicle reached over to the glove box and he kind of hesitated and he opened the glove box and there was this black case.

Q When you saw the black case, what did you do or say?

A I told my partner that there was a gun in the vehicle, sir.

Q Had you seen something like that before, the exhibit 70?

A Yes, I have.

Q Where had you seen something like that before this?

A I've seen a similar case. I own one myself.

Q What happened when you told your partner that you saw something that looked like a gun?

A Okay, he kind of looked up at me a little bit startled, and then I said gun again, and at the same time we had a second patrol pulled up for backup and they come up and the four of us got the individuals out of the vehicle.

Q What was—who was the backup, that is, what was the names of the officers in the other vehicle?

A It would have been PFC Cherabino (ph) and Investigator Trabucco.

Q Explain what you did and what you mean when you say got them out of the vehicle?

A Okay. When I noticed the case—like I said, I informed Ecker, I opened the passenger door, Trabucco come up along the passenger side of the vehicle with me, and we [942] got the individual out of the car, you know, told him to get out of the car, and they were getting out and we helped them out, and Trabucco moved the individual to the back of the car for officer safety.

Q Let me show you photographs which have been marked as exhibits 142, 143, and 144. Do you recognize what's shown in exhibits 142, 143 and 144?

A Yes, sir, I do.

Q What is that?

A That would be the vehicle that we stopped, sir.

Q What was—did you record the license number of vehicle that you stopped?

A Yes, sir, I did.

Q What was the license number of vehicle you stopped?

A I'd have to refer to my notes.

Q Please do that?

A We stopped a red in color Nissan Sentra with a Mississippi license plate 1-E-C-H-5-1-5.

Q And what is the license number of the vehicle shown in the photographs?

A It would be a Mississippi license place 1-E-C-H-5-1-5.

MR. LINTON: Judge, I move the admission of the three photographs.

MR. BUTLER: No objection.

THE COURT: Those were 140—I'm sorry, I didn't hear

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[1091] have thin cuticles, that's significant.

Q Is a scientist able to determine that hairs could have come from the same source?
A There's no—you can't have a positive identification with hair comparisons.
Q I gather you're saying that you cannot conclude that the hairs actually did come from the same source?
A That's correct.
Q Can you explain briefly why you can't reach that conclusion, that is, that two head hairs actually did come from the same person?
A Well we found that on occasion, you will have different people that will have very similar or even the same microscopic features. However, that doesn't happen very often. I can only recall a handful of times during my career that I've seen people that have very similar or the same microscopic features in their hair samples.

MR. LINTON: Judge, if I could have a second to get some exhibits to show the witness?

(Pause)

MR. LINTON: Do we have the gloves. What happened to those gloves? Here's some gloves, we've got rubber gloves. I'm going to put in front of you a number of items. I've put in front of you, exhibit 59, a sweater worn by [K.G.].

I've put in front of you exhibit 97, an envelope, which on the [1092] outside says James Hunter, but had inside it some Dexter Jackson envelopes, exhibit 98, which had on the outside, Dexter Jackson, but when it showed up in court had Mr. James Hunter's small packet's inside, and what's been marked and admitted as exhibit 6, which was, it said on the outside Mr. William Osborne and the two packets inside said Mr. William Osborne.

MR. BUTLER: What was that, 96?

MR. LINTON: Yes, sir, it's 96, yes, sir.

BY MR. LINTON:

Q Then I hand you what's been marked as exhibit 100, and ask you whether you recognize that?
A Yes, I do.
Q Is that a hair that you found in the course of an examination of some of the things in front of you?
A Yes, this is a hair that I collected from the left shoulder seam of the sweater, exhibit 59.
Q Would you show us where on the sweater you found the hair which is exhibit 100?
A On approximately the left shoulder seam, I'd say in approximately this area.
Q Hold it up so the jury can see what the orientation of the sweater is.
A In this area over in here.
Q And did you compare that hair which is exhibit—well, [1093] excuse me, where did you get the hair which is exhibit 100—excuse me, you just told us where you got it. Did you make a comparison of the hair that you found on the left shoulder of the sweater . . . . .
A Yes, I did.
Q . . . . . to the hairs which are in exhibit 96, 97 and 98?
A Yes, I did.
Q When you did that, what did you conclude?
A Well first of all I determined that the hair that was found on the left shoulder seam was a pubic hair that had negroid features, and then I compared it to these three individuals and I found that it was dissimilar to the hair sample from Dexter Jackson and dissimilar to the hair sample from James Hunter, and it exhibited the same microscopic

features as the pubic hair sample from William Osborne, and therefore I concluded that it could have come from William Osborne.

Q Let me show you what's been marked as exhibit 99, and ask you whether you received exhibit 99 in the laboratory?

A Yes, I did.

Q Would you describe how it was that you received exhibit 99?

A I received it from one of my co-workers, Leanne Strickland.

Q Who is she?

[1094] A She is a serologist in the laboratory.

Q What kind of examinations does she make?

A Serological examinations. She analyzes blood and body fluids.

Q And did you receive that exhibit with the understanding that it had been taken from her from a condom that she had examined?

A That's what she identified it to me as coming from.

Q Once you had the hair yourself, did you compare it to the hair of Mr. Osborne, Mr. Jackson and Mr. Hunter?

A Yes, I did.

Q What did you conclude, or what did you find when you made that comparison?

A I found that that hair that was collected from the condom was also a pubic hair that had negroid features and that hair was dissimilar to the pubic hair sample from Dexter Jackson, it was dissimilar to the pubic hair sample from James Hunter, and it exhibited the same microscopic features as the pubic hair sample from William Osborne. Therefore it was consistent with having come from William Osborne.

Q We'll put these things aside for a second. Ma'am I'll show you what's been marked as exhibit 102, and ask you whether you received that in your laboratory with the understanding that it was a portion of a carpet taken [1095] from a red Nissan Sentra?
A Yes.
Q Did you compare anything found on exhibit 59, the sweater, with exhibit 102?
A Yes, I did. I found two gray carpet fibers on the sweater that I compared to the carpet sample.
Q Let me ask you something—some questions about the comparison of carpet fibers. First, what does the term fiber mean?
A Fiber is the smallest part of a textile material.
Q From what is the term fiber to be distinguished in textile materials?
A Well if you have a number of fibers and you twist those together, you'll have a yarn or a thread, and then those yarns can either be woven or knit into fabric, or they can be tufted into carpet.
Q What are the classifications of fibers and give us some examples of the different classifications?
A Could I draw some stuff on the board again for this?
Q Please, with the Court's permission.

THE COURT: Sure.

(Witness at board)

A There's several classifications of fibers I'm just going to talk in general about. First, there's natural fibers and this would include such things as animal fibers or

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[1722] that is present. And here you can see that there—there's a blue dot at the 2 and a blue dot at

the 4. So this person contains a 2 allele and a 4 allele. That is one of the 21 types.

It will also react with this probe. That reacts with a 1.2, 1.3, 4, because the 4 is present, as well as everything but the 1.3. I will read a series of dots on the strip to determine the DQ Alpha type present.

And lastly—and the last transparency which is designated "Advantages of PCR." Some of the reasons that we have chosen to use this process in our laboratory is that the process allows us to amplify very small quantities of DNA. Because it does amplify, making additional copies of the DNA, we can use very small stains and are able to amplify and type the stains.

THE COURT: This is Exhibit 153-I.

(Plaintiff's Exhibit 153-I is admitted)

A Another reason is that degraded DNA can be utilized. Degraded means altered in form. For instance, if it's been out in the sunlight for a long period of time, it can be degraded somewhat. Or certain chemical, environmental insults can possibly degrade DNA. Our tests allow us to look at degraded DNA where another type of DNA analysis may not allow into, because it requires less [1723] degraded, high-molecular rate DNA.

It's also very rapid. You can—this process can be completed in two days or less at times.

It's non-radioactive. Many DNA type tests require radioactivity. Ours does not, and it is relatively inexpensive for our system.

And that's all I have on the overhead.

Q Thank you. Can we get xerox copies of your overheads?

A Yes.

(Pause)

Q Ms. Strickland, in your work at the crime lab, do you sometimes examine the roots of hairs for DNA?
A Yes, I do.
Q And did you do that in this case?
A Yes, I did.
Q Were you able to obtain a DQ Alpha result on any of the hair roots that you examined in this case?
A Now, I examined two hairs in this case. And on neither of the hairs was I able to obtain a DQ Alpha type.
Q Had you found one of those hairs?
A Yes, one of the hairs I isolated while working an item referred to as a condom in this case. Upon opening the item, I observed a hair on the condom, and I removed it and packaged it for later examination by the hairs and fibers expert.
[1724] Q Did you identify that hair in any certain way?
A Yes, I did. If I can refer to my notes?
Q Sure.
A That hair that I collected from the condom was given the number LS-1.
Q And at this time, I'm going to hand you what's been admitted as State's Exhibit No. 19. Do you recognize that item?

(Pause)

A Yes, I do. This is an item that I received. It's No. 101422, and that is a blue condom, and I also have my signature, as well as the different case identifiers, on the outside of the package here.
Q Is that the condom that you found the hair on you just described?

A Yes, it is.
Q And at this time, I'm going to hand you what's been admitted as State's Exhibit No. 99. Do you recognize that item?

(Pause)

A Yes, this is the envelope that I packaged the black hair in. On the outside of the package, it says: "Black hair collected from the condom, No. 101422, by LS," and that's myself, and the date at which it was collected.
Q You said you examined two hairs. Where did the other [1725] hair come from?
A The other hair was not collected by myself. It was collected by Janeice Fair, and it was a hair from a sweatshirt, No. 36998.
Q I'm going to hand you what's been admitted (indiscernible—muttering).

MR. BUTLER: Right behind you there. Direct—right there. The blue box is it.

MS. WIBKER: Oh.

(Pause)

Q Okay. You just referred to an identifying number on the sweater that the hair had come from?
A Yes.
Q I'm going to hand you what's been admitted as State's Exhibit No. 59. It appears to also have a red tag from the lab on it. Could you examine that and see if that, in fact, corresponds to the identification of the hair that you were given?

(Pause)

A Okay. This is a sweater that I have looked at, No. 36998. I need to look at one other piece of evidence.

(Pause)

Q 59?

A Okay. The hair was collected by Janeice Fair, not myself, and it was given the number 36998-A by Janeice Fair [1726] and it was from a sweater 36998. But I do not know that I know which sweater . . . . .

Q Okay.

A . . . . . it came from.

Q So you just got the hair?

A That's correct.

Q Okay. Now, how do you determine whether or not you can type—do an HL DQ Alpha type on a hair root?

A I will first do a microscopic examination to look at the hair under the microscope. And the root portion is the end portion of the hair that will actually go into the scalp. And I will see if the hair does contain a root, as well as if it contains tissue surrounding the root, tissue of the hair. Whether or not it does, I will usually go ahead and run the hair to determine if a DQ Alpha type is present.

Q Were you able to get a DQ Alpha type on the two hairs you examined in this case?

A No, I was not.

Q Can you tell the jury some of the reasons you may not get a type on a hair root?

A One reason might be that there was insufficient DNA to analyze. There is a lower limit to our—to our kit, and it is possible that there was insufficient DNA to type. I have typed numerous hairs and it is—I have [1727] seen that sometimes I'm able to DQ Alpha type and other times I am not.

It also may be that the DNA that was present on the hair could have been degraded to the point where I could not analyze it.

Q When you say insufficient DNA, do you mean whatever was there was too small a sample?
A Right, insufficient meaning not an adequate amount of DNA present. The amount of DNA present was too small for our typing technique.
Q When you say the DNA may be broken down or degraded—I think you testified earlier that you use a technique so that you actually can work with degraded DNA. So what happens if it's so degraded that you can't work with it?
A If it is too degraded to work with, you will not get a type. You won't get an—an—a type that is wrong, you just will not get a type if the DNA is so broken down that it is not even typable. We're actually looking at a region on the DNA that is approximately 239 to 242 base pairs long. That's the link of the gene that we're look—or the portion of the gene we're looking at. And if the DNA is degraded or broken down to where that number of bases are not intact, it's possible that we could not type it.
Q Are there other reasons you may not be able to type DNA [1728] from a hair root?
A If there's some kind of contaminant on the hair possibly. There are—it is known in this typing test that you can have inhibitors present. And if an inhibitor is present, you will not be able to obtain a type. The literature doesn't really state what these inhibitors are. It's just known in the laboratory that a test can be inhibited. You can have a sample that appears to have adequate amount of DNA, but there is something in—in the sample that is actually inhibiting the enzymatic process for amplification.
Q Now, are you actually examining the hair or are you looking at a spe—-a certain part of the hair?
A When I do an exam on a hair for DQ Alpha, I will cut a portion of the root off about one centimeter, and

then I will go up from that and the shaft of the hair above the root, will also cut a portion of that off to use as a control. I will extract the DNA from—from the hair root and then process both the root and the shaft to determine the DQ Alpha type.

Q When you say the shaft, do you mean the part that would be near the body?

A The root is the bulbous part. It's like a little bulb. If you even think of a bulb plant, it looks like that. So the root is the bulb portion of the hair that's down [1729] in the scalp. Extending from that, it looks more like a pencil. It's just a shaft, a long portion of the hair. That is not a region that you should be able to type DNA from, because the shaft should not contain viable DNA or DNA that we'd be able to type.

Q When you're looking for DNA on a hair, are you looking for some kind of tissue in the bulb of the hair?

A There is at times when a hair is removed in a certain way. And I—I don't know exactly how, it may be plucked, that you have tissue which is part of your skin like around the bulb of that hair. And it's been my experience that if you have some tissue around the root of the hair, you are more likely to get a DQ Alpha result. Meaning there was more DNA present since the tissue is present around the root of the hair.

Q Let's talk about the victim's clothing in this case. Were you asked to examine some clothing from the victim?

A Yes, I was.

Q And what items were you asked to look at that were identified as the victim or a female's clothing?

A There was an item No. 091952, which was a sweater, and then another item No. 36998, contained two sweaters and a turtleneck shirt. And I analyzed each of these.

(Pause)

Q When you say you analyzed them, what's the first thing [1730] that you do with the clothing?

(Pause)

A For these pieces of evidence, I was looking for the presence of semen, trying to determine if semen was present on the sweaters or on the turtleneck shirt. And the first thing I did was a visual exam, and I was using the Argon laser to see if fluorescence was present—fluorescent stains were present on the sweaters or on the turtle neck. And if I was able to find fluorescence, then I would do a presumptive test, which is a color test, for the possible presence of semen. If I did find a positive presumptive test, I would then further the exam and look for the presence of spermatozoa in the stains.

Q And did you do that with the items that were given to you?

A Yes, I did.

Q And did any of those items fluoresce?

A Yes, I believe they did.

Q And which items fluoresced when you went over them with the laser?

(Pause)

A The item 091952, which was a sweater, I did find some fluorescence on, and I did the presumptive sperm test or semen test, and that was a negative result on that [1731] sweater. And on item 36998, there were two sweaters and a turtle neck shirt, and on all of these items, it's—on two of the sweaters, I did observe fluorescence. On a third, I do not believe I observed fluorescence. I still did a presumptive test on—on that item, the turtleneck as well.

Q But you got fluorescence on the sweater identified as 91952?

A 91952, yes, I did.
Q And what else?
A On the sweater 36998.
Q Okay. Did you identi- —did you give a more specific description of that sweater?
A Yes, on my notes, I have 36998-A and 36998-B, two sweaters from that item that I found fluorescent stains on.
Q Earlier you mentioned you had looked at this sweater before. Is this one of the ones that fluoresced?

(Pause)

Q The tag is 36998.
A Yes. With my drawing, I can tell that's the 36998-A, and that did fluoresce, and I do see stains where I have actually cut regions of the sweater.
Q And there was another one identified by 36998 that fluoresced?
[1732] A Yes.
Q Do you have a sketch for yourself of that one?
A Yes, I do.
Q Did you identify for yourself the colors?
A Yes. It's blue, brown, green, red and orange, sweater.
Q Does that look familiar?
A That's consistent with the colors.

(Pause)

Q This has been previously admitted as State's Exhibit No. 57, and it also has a tag from the lab in it here.
A Yes, that's the tag that I put. It's 36998-B. This is the second sweater that I've analyzed, and I was—I did test this sweater and it did have a slight fluorescence on the sweater.

Q Now, what are kinds of things that would make these sweaters fluoresce?

A I know that semen fluoresces. The semen itself may have a chemical in it that fluoresces or it may be due to certain bacteria on the stain that fluoresce. However, there are other stains that do fluoresce, because many times in the lab, I can have a stain that fluoresces. I then further test it and I'm unable to confirm the presence of semen. What these actually are, I do not know. They may be at times vaginal secretions or possibly urine. I do not know in the literature where I've read [1733] all the different stains that fluoresce, but I am aware that other stains fluoresce besides semen.

Q After the—you found fluorescence on a—you sa-—the two sweaters we just looked at and then actually the one other sweater . . . . .

THE COURT: What was the exhibit number on those two sweaters?

MS. WIBKER: Sure. 57 and 59.

THE COURT: Those are the two she just identified?

MS. WIBKER: And the one other sweater that you mentioned . . . . .

(Pause)

Q You referred to 91952. This is State's Exhibit No. 56.

Did you sketch the other sweater that fluoresced?

A Yes, I did.

Q I'm going to ask you to look at the lab tag on this sweater and tell me if this is the other sweater that fluoresced. And this one's been stapled up here, but—

okay. Here's one of the tags, and then I think the lab puts its own tag in there.

A Yes, this is my marking, 91952, with my initial, LS, for this case number.

MS. WIBKER: And this is State's Exhibit No. 56.

Q And was this the other sweater that fluoresced?

A Yes, it did.

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[1761] here—and see if that item is the condom that you checked?

A I have here on the outside of the package my identifying numbers, as well as the number 101422. That was the item number when I received it and the day at which this was sealed. This again is Exhibit No. 19.

Q And what did you do to check the condom for the presence of semen?

A For this condom I took sterile swabs, and I placed the swabs inside the condom, removing fluid from inside the condom and then tested that for—with the presumptive chemical test to determine if I could get a presumptive test. And I also tested the outside of the condom in the same way, taking a swab and rubbing it on the outside of this—of the condom and testing it with the presumptive chemical test.

Q What kind of condition was this condom in when you got it?

A When I received the condom, it was pla- —had been placed in a plastic cup, closed plastic cup. Upon opening the lid, I realized that—I knew the condom had been in there for some time because of the smell that I had smelled, as well as the fact when I emptied it out, there was still a lot of liquid. Normally I do prefer to get a—an item that is dried. In this case, there was [1762] liquid still in the condom.

I removed the condom from the plastic cup and laid it out on the cabinet. It was—it had been rolled down, so I actually unrolled the condom and laid it out and photographed it, both the way I got it out of the cup, as well as laid out.

Q Were you still able to work with the condom even though it had been in a cup?
A Yes, I was.
Q What were you able to determine about the semen that you found in the condom?
A I did determine that spermatozoa were present in the condom, and once I determined that spermatozoa were present, I then did the DQ Alpha testing that I have described previously. And the DQ Alpha type from the spermatozoa in the condom was a 1.2, 4.
Q And does that mean that a 1.2 came from one parent and a 4 came from the other parent?
A Yes, it does.
Q Okay. Now had you been given some known blood samples to identify HLDQ Alpha types from known individuals?
A Yes, I was.
Q And who were the individuals that you had been provided their known blood types?
A I received known bloods from a [K.G.], a Dexter [1763] Jackson, William Osborne and James Hunter.
Q And could we just put on the board there with the marker the HLDQ Alpha types that you obtained on each of those four people?
A Yes.
Q For [K.G.], —you can just put the last name—would you identify the DQ Alpha type that you obtained on that person?
A For [K.G.], the HLA DQ Alpha was a 2, 3.
Q And Hunter, James Hunter?

A For Hunter, the DQ Alpha was a 1.1, 4.
Q And Dexter Jackson?
A For Jackson, the DQ Alpha was a 4, 4.
Q And for Os- —William Osborne?
A For Osborne, the DQ Alpha was a 1.2, 4.
Q And did the condom match any of those known DQ Alpha types from those four persons?
A The DQ Alpha from the spermatozoa in the condom was a 1.2, 4, and that included Osborne, William Osborne, as a possible source of that semen.
Q Now are you able to say that William Osborne is the source of that semen?
A No, I am able to say he is a possible source of that semen—is included as a possible source since he has a 1.2, 4 DQ Alpha type—1.2, 4 and the condom—the [1764] spermatozoa in the condom, the DQ Alpha was a 1.2, 4.
Q Now do you rely on frequency tables that tell you how often these DQ Alpha types are found in a group of a population?
A Yes, we do have databases that we refer to. These are published databases. We have one that we refer to that was published by Helmuth (ph), et al. And (indiscernible—garbled speech) published the databases showing how these different gene frequencies fall in different populations.
Q You can sit down if you want.
A Thank you.
Q And do you have that database in front of you? Do you have a reference you can use?
A Yes, I do.
Q What is the frequency of the HLDQ Alpha type that you obtained on William Osborne?
A I'm going to get the table out. Again, this study was by Helmuth—published by Helmuth, and—for Osborne?

Q Yes.
A Whose type was a 1.2, 4, and in the black population, a 1.2, 4, the expected genotype frequency was approximately 16 percent. In the study the observed genotype frequency, actually doing the study and counting the different genotypes—the observed genotype frequency [1765] was 14.7. This then would say that between 14.7 and 16 percent of the black population would have the genotype 1.2, 4.
Q The sample that's used to come up with that frequency, does that include male and female?
A To my understanding it does. I did not do this study, but I—from studies that we're doing in the lab, the bloods that we obtained, they're both male and female. And from talking with different experts at the FBI, it does appear that the samples are both from male and female.
Q Are you able to go another step and say that given that we're just working with males, we could cut that number in half?
A I personally will not testify to that. I know that if a study is done for males and females, only the males—a portion of that population will donate sperm, not the female portion of that population. But as to whether you can cut that in half from 14 to 16 percent to 8, I would not care to—to say yes to that, because I do not know what percent of the original population studied was male and female.
Q What is the frequency of the type you obtained on [K.G.]?
A The DQ Alpha type for [K.G.] was a 2, 3 and—which

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[2190] was with me when it happened, but I chose not to tell anybody until I got a subpoena."

Now, that doesn't ring true. You don't do that. And, again, as confident as she was, you probably knew that this wasn't on the up and up way before a P.h.D. told you that it's reason to doubt.

The identification of the car. Again, [K.G.] was cautious and careful. You heard Lieutenant Gifford describe how she walked around the car, how she looked for the stain she remembered in the front seat. And no matter how much that car looked like the one she was in, she wouldn't say that was the one until she saw that stain on the front seat.

And she didn't—the radar detector was mounted on the bracket when she was in the car. When she looked at it at APD, it was on the front seat. And she wasn't willing to say, "This is the car," because that radar detector didn't look the same to her.

The thing that finally convinced [K.G.] that this was the car was this: Which is when she saw her Tride perfume. Remember, she said it looks like a twisted black square? That's exactly what it looks like. If this—if you took this bottle square and twisted it, it's a twisted black square. That's her Tride perfume that says Tride on the bottom. This is what finally convinced her that she could be certain enough to say, "Yes, this is the car that I was [2191] assaulted in. This is my Tride perfume."

You heard that Lieutenant Gifford said that she looked at the door locks on the front door and you can see those in one of the photos that's in evidence. You can see the door locks on the front door there. If you look at the door from the side, they look wide. If you look at the door from, say, the back seat, they look thin and narrow. Well, [K.G.] remembered thin door locks. She remembered them being not very wide,

and when she looked at the car at APD, she was looking at it from the side. And she saw wide door locks, and she didn't like that. That wasn't what she remembered. And it was only after she tried to see the view from the back seat, what those door locks would look like from someone in the back seat that she was able to say, "Okay. Yes, this is the car."

If you've got any doubts about her eyesight, when [K.G.] testified, she told you that she saw a condom in the car. And when the officers testified about what was in the car, they didn't find a condom in the car. What they found was this little sample of Tride (sic) perfume. It's in a little blue and gold packet, barely—probably not even two by two. And if you'll remember, [K.G.] was carrying blue condoms that night in a blue foil packet, and part of the wrapper was found right by the blue condom that had William Osborne's semen in it. And you can see there's just a little [2192] bit of it in here. But what you can see is, it's blue and gold foil. And it's just about the same size as that Mesmerize perfume.

That's what [K.G.] saw in the car that night. She saw the Mesmerize perfume, and she thought it was her condom. They're both blue and gold, and they're both exactly the same size.

Again, you've got somebody being careful, somebody being cautious. This is not somebody that just came in into this with an axe to grind, a beef, a vindictive motive, none of that. Remember, the police went to her. She never went to the police.

I want to talk a little bit about the glasses that were admitted into evidence, because you have to be careful when you use those glasses in the jury room. The temptation is to put those glasses on and go look

at somebody's face up close and see what [K.G.] could see in somebody's face. And when you do that, you're not seeing what she saw.

The doctor—the eye doctor told you that for ten inches in, those glasses are not what [K.G.] saw. They only mimic what she sees at a distance, at greater than ten inches. So when you try to see what she saw in a face up close, you can't do it. You're not able to see what she saw up close. And so when she was talking to Osborne at the passenger door of the car to negotiate this phony deal and when she was in

* * * *

[2202] stopped, red car. It's got this gun in the glove compartment. This gun fired the shell casing that's sitting right next to Jackson's tire print. That's Jackson's tire print. And you've got the photo that shows this fifth shell casing and this tire track right next to each other at the scene. So right there, you've got Jackson's car at the scene. You've got Jackson's gun and the shell casing at the scene.

And flashing the high beams. Remember how Jackson signaled the car that Osborne was in the night they left the Space Station? The same way, flashed his high beams at Riley's car to get them to stop. That starts the case.

What else do we have that tells you these two are the people that did it without [K.G.]? You've got Osborne calling Jackson twice from the Space Station before the crime. Now, knowing that Jackson's car's involved, knowing that Jackson's gun's involved, it's pretty relevant to who was calling Jackson that night before this happened. Osborne's calling him.

And it's not coincidence that right after Osborne calls him, the two of them meet up right by the Space

Station. How does Jackson know where they are? One would assume the plan was to meet at the Space Station, and Jackson did just what Riley and Robinson said they did was they took the fastest way home, which was Fireweed. Jackson gets to the Space Station, right in the area he finds them, flags them.

[2203] The next thing you have is Osborne getting in Jackson's car. Right before this happens just after 9:30, Osborne and Jackson are in the car together right in Spenard, right by where they pick up [K.G.]. We know Jackson's car made it to the scene that night, 'cause it was there. The tire tracks are there. The shell casing's there. You know Jackson's gun was involved.

The condom found at the scene. Without [K.G.], we wouldn't know that the blue condom was in her purse. You wouldn't know it was her's. But you have a blue condom with Osborne's semen in it at the scene, right by where they found the shell casing and the tire tracks, the same area. You've also got Osborne's pubic hair on that condom.

That condom has epithelial cells on the outside of it. Now, let's talk a minute about the semen, the pubic hair and the epithelial cells. You heard the DQ Alpha type on the semen is found in just over 14% of the black population. So you can say, "Okay. Ma- — you know, two people can have the same DQ Alpha type." But there was also a pubic hair on that condom that matched Osborne's.

And you remember all the things that Janeice Fair said she goes through when she does hair analysis? Remember all the tiny little details that she has to compare? She talked about the size of the shaft, the size of the cortex, the length of the cortex. Part of the

hair has little scaly [2204] features to it. That has to match. The color has to match. There are like ten things that she looks at, and they all have to be the same for her to call that hair exactly the same.

She looked at the hair and said, "It's not Jackson's." Something about Jackson's hair was different. Maybe it was a different cortex. Maybe it was a little different shade. Something allowed her to rule it out. She ruled out Hunter. "It's not James Hunter." But everything about that hair was exactly the same as William Osborne, and the DQ Alpha in that semen in the condom was the same as William Osborne.

Now, you're going to hear, "Okay. More than one person can have the same DQ Alpha type. More than one person can have the same hair. Thus—can have similar hair." Janeice Fair said that a handful of times in her nine-year career doing this, has she seen two people with similar hairs. But now I ask you, what are the chances those two would come up together on the same condom? What are the chances there's someone around—walking around out there with not just the same se- —DNA type in the semen and not just the same hair, but both in the same person together? And I submit to you the odds of that are minimal.

Epithelial cells were on the outside of the condom. Ms. Strickland told you that epithelial cells come from the mouth, the inside of the mouth, the inside of the rectum and the inside of the vagina, which tells you something about where [2205] that condom's been, even without [K.G.].

The other thing you have—this is the sweater that was spread on the front seat of the car. This is the sweater that had Osborne's pubic hair on it. This is

also the sweater that had fibers on it from the carpet. This is the piece of carpet that was cut from the front passenger side of the car. It's the piece of carpet that had some dirt on it and it had some little blood stains on it. Fibers from this piece of carpet were found in this sweater.

That makes this sweater a very important piece of evidence, because it links [K.G.], Jackson and Osborne together. It puts all three of them together right there.

The other thing about this sweater was that it fluoresced when the crime lab looked at it. Fluorescence means a couple of things. It means you've got semen, vaginal fluid or saliva. Well, when this sweater fluoresced and they tested it for sperm, there was no sperm, which means that if the stain on it was semen, it come from somebody that did not produce sperm.

Ruling that out, there's still the possibility, though, the fluorescence then could have come from saliva or from vaginal fluid, and that again is perfectly consistent with what [K.G.] testified to. Remember she said she wiped her mouth? She wiped the semen from her mouth on the sweater in the passenger seat. And the presence of saliva fluoresc- [2206] ing—the possibility of saliva fluorescing on that sweater is perfectly consistent with her testimony.

The thing—the other piece of evidence that goes to ID is the blood swab on the metal part of the door that was [K.G.]'s blood. This is the swab. And if you'll remember on the slide, Detective Shore said it was right over here? He says he could almost see it. You can see the little spot. Actually, it's up here. It's up in this area. This is the swab that was taken from that

part of the car that came back [K.G.]'s DQ Alpha type, which places her in the car.

I want to talk a little bit about luminal at this point, because you heard a lot about luminal as a way to look at blood that's not visible to the naked eye. The blood that you heard about on the passenger door, on the strip—the black strip that goes through the passenger door on the side of the carpet right by the passenger door. And even Detective Potter told you there was blood at point C in the snow, which is—C is where the condom was found. And in reality, it's probably fairly close to the passenger door. And what you've got is blood in the car clustered right around here where the spots are and then right there in the snow.

And the testimony indicated that that blood had to get there when the passenger door was open, because it was in spots that it couldn't get to if the passenger door was shut.

* * * *

[2213] He used it on his radar detector. An axe handle is found at the scene within throwing distance from where this happened. It's just like the axe handle that Osborne had in his room behind his locker.

I'm going to show you an overhead on ID, because ID is one of the things you're asked to put a lot of weight on in your deliberations, particularly on Osborne. And what I want to do is show you that there's not one ID witness to Osborne. There's 14 ID witnesses, and [K.G.] is just one of fourteen that goes to his identity.

The ATU records and the video record—the videos of the Space Station identify Osborne as the person

that called Jackson before the crime. Riley and Robinson identify Osborne as the person that Jackson flagged to stop. Riley and Robinson identify Osborne as the person who got in Jackson's car right before the offense.

(Tape Change)

Detective Gray found the axe handle in Osborne's room that fits with Dr. Rogers description of the instrument that did the bruises on [K.G.]'s leg. Remember Dr. Rogers said a long, hard cylindrical object did that? Because you have parallel bruises. You have two bruises on each side with a [2214] lighter space in the middle. Officer Evans found the axe handle at the scene, the one in the snow out there, just like the one in Osborne's room, only it has black tape on it. Marlon Hall told you that Jackson carried an axe handle in his car. Again, just like the axe handle Osborne had in his room.

Lee Ann Strickland told you that Osborne's semen was in the condom. Janeice Fair told you that Osborne's pubic hair was on the condom and on [K.G.]'s sweater.

Marika and Tanya Hinton saw Osborne with Jackson afterwards, both with blood on them. Four people came in and told you that, the two Hintons, Rena Waggoner and James Hunter.

And finally, Osborne returns to the barracks with Jackson. Riley, Robinson and Hall are witnesses to that.

Now, those are 13 people that go directly—their testimony goes directly to the identity of Osborne as one of the perpetrators of this crime. [K.G.] is one. [K.G.] picked him out of a lineup. [K.G.] identified him in court.

So when you consider—when you're asked to question [K.G.]'s vision, was she on drugs, could she see, was it dark, how light was the moon, was the light on in the car, you're asked to look at, well, did she get a good look when she negotiated the deal with him up front at the passenger door? Did she get a good look when the dome light was on and they were having sex in the car. That's not all of it. [2215] You've got a—you've got 13 other people to consider when you're looking at whether Osborne is the other person involved in this.

Now, you can do the same thing with Jackson. I didn't prepare an overhead on it, but you've got a long list of evidence that identifies Jackson as the other person involved, even if we never heard from [K.G.].

If we never heard from [K.G.], you've got objective evidence of burying. You've got the berm. You've got the blood in the berm. You've got Michelle Rhyne telling you that she had little snow wads in her hair and her sweater, just like Michelle's kids look when they have snow fights and when they make angels in the snow. She said the disturbance in the berm looked like there had been a struggle there. You've got Lieutenant Gifford's testimony that there was soaked blood in there, consistent with someone being stationary. And you've got Greg Saraf telling you that [K.G.] came home with snow packed in the neck of her clothing.

You've got objective evidence that [K.G.] was shot in the head, even if she never came here. You have Dr. Hudson, who saw her the first night, and Dr. Rogers who saw pictures of her. He didn't treat her. He looked at pictures of her and did a diagnosis. Both said that the wound in her head was consistent with

a gunshot wound. Not with an—being hit by a bat, not with being hit by an axe handle, not with being hit

* * * *

[2228] she's not, she will be."

You have objective evidence of burying. There's your witnesses there. Why would they bury her if they didn't think she was dead? Why would they bury her if they thought she was going to walk out the road and go tell the police what happened? The burying shows the intent to kill.

They shot her in the head, they buried her, they discussed her death, and left her in what they thought was her grave.

You're likely to hear, "Why didn't they just make sure they did it right? What—why did they—why would they take a chance on a grazing wound and drive away? Why didn't they just go right up to her head and plug her and know for sure she's out and she'll never say a word?" Look at how she looked when they left her. She looks like she's out. Her head is bleeding a lot. Her head is bleeding all over the place. She's in the snow and she appears to be out and they've just shot her in the head.

And shooting her in the head is accomplice liability, which goes back to the aiding and abetting, so that you don't have to find absolutely beyond a reasonable doubt that Jackson shot or that Osborne shot. If you believe that one shot and the other was going along with the plan, they're both guilty for the shooting.

But the evidence shows that when they left there, they [2229] thought they had killed her. There was

no need for them to go back or to shoot again or to make sure that they got it right. Her head's covered with blood, she's out, she's in the snow, and they think they've killed her. Their remarks show that they think they've killed her. So what do they do? They bury her and they leave and they have no reason to think that they didn't accomplish the job.

The other thing they do is they leave evidence at the scene. People that aren't detectives and aren't in law enforcement hear you never leave your semen at the scene. Osborne left his semen at the scene. The only reason to do that is if he thought that no one could ever tell the police who was there. That is very damning evidence. It turned out to be incredibly damning with both his pubic hair and his semen in that condom. If you thought that somebody was going to crawl out of the snow and go to the police, you wouldn't do that. The only reason it's safe to do that is if you're not going to have somebody talking later.

The other thing that shows they thought they had killed her was Jackson continued to carry the gun around. Remember when he got stopped on post? The gun's in his glove compartment. He's driving around on base with it. You would expect someone to go—dispose of the gun. Go get rid of it. Well, it was safe to carry that gun as long as no body had been found.

[2230] And, remember, Detective Branchflower told you there was no press. There was no publicity. Nobody knew anything until after it was publicized that they were arrested. So they didn't know. They did—for all they knew a week later when they were—when Jackson was stopped on post, was that she was dead, and that made it safe to carry the gun around, the gun that had fired a spent shell that was at the scene.

These are the facts that show the intent to cause her death. The intent was there. Now, I told you, you don't need a plan, but in this case, you actually do have some evidence that there was a plan. That this was thought out before. Part of that evidence, I said before, was the first thing they do when they get there to the scene is they pull the gun and they have sex with her at gunpoint and then tell her to lie face down in the snow.

There's no discussion along the way about how the—how that's going to happen. There's no planning at all with [K.G.] in the car. You don't hear anybody say—when Jackson says, "Get out and lie face down in the snow," you don't hear anybody say, "I thought we were just going to rape her. I didn't know we were going to kill her, too." You don't have anything like that. You don't have any discussion. [K.G.] told you the things that were said that she remembered. And what you have are two people working together and not needing to talk about what they're doing. The whole

* * * *

[2344] The next thing you do is you know that the person that did this has to be taller than Dexter Jackson. So all the black men who are shorter than him could go. They're not going to be people that could do this.

Next thing you need to know is how many had military haircuts back on March 22nd? The—what was it called, high and tight? The haircut that you saw that was used in the lineups with the suspects, you could eliminate all the black men that didn't have that haircut on March 22nd. So your pool's getting smaller and smaller.

The next thing you've got to do is eliminate everybody that doesn't look like William Osborne, because [K.G.] picked Osborne out of a lineup, and then she came in here and recognized him in court. You've got to have—the person that did this must look a whole lot like William Osborne, so much so that people down in Washington recognized him from—just from the sketch. So right there, you take the ones that are still in the room and send home everybody that doesn't look like Osborne.

Then how many of you have axe handles in your room? You can send home everybody that doesn't have access to an axe handle.

How many of this pool that are left called Jackson on March 22nd? In the suspect pool here, would be persons who con —who talked to him, were involved in the planning. You [2345] could eliminate everybody that didn't call Jackson on March 21- —22nd.

How many people rode in Jackson's car on March 22nd? The pool of people that could have done this all had to have ridden in Jackson's car on March 22nd.

Then we get down to things like, how many people left in this pool were in Jackson's car on March 22nd and ejaculated into a blue condom?

So when we're talking DNA, we're not just talking the whole pool of DNA people with the same amount, we're talking about a real small group who were in Jackson's car that night at Earthquake Park, ejaculated and had contact with [K.G.]'s sweater.

A —next question: You could eliminate everybody who didn't have contact with [K.G.]'s sweater that night, because we know that the person that did this had contact with her sweater. There's a public hair on it.

The person that did this had a pubic hair touch her condom. You could eliminate everybody who didn't—whose genitals didn't touch her condom that night. How many do you think we have left now in the pool of possible people that could have done this?

Then you start working—how many of the number that's left, which is probably one by now, were with Jackson after about 10:30? The person that did this had to have been with [2346] him before and had to have been with him after. Then how many have you got?

How many people have you got left in this pool who had blood on their clothing after about 10:30 after this happened? And I submit to you, members of the jury, you'll come out with one person in the group that could have done this. You only have one person who fits all of the criteria that you have to fit to be a suspect in this case. This is not a case where one in five black males is a suspect. Absolutely not. It's much narrower than that.

One more point that I want to make about Jackson being somewhat in the dark about these things going on. You've heard that [K.G.]—you've heard arguments that sex in the front seat was actually consensual, and you've heard that [K.G.] was the one that knew the area the most. Jackson wasn't real familiar with the area, so she was the one directing the car and she found the spot and everything was really just fine until she won't get out of the car and Jackson has to knock her in the head with the gun.

The evidence doesn't support that. Not at all. The evidence is that right up front when [K.G.] suggested a place to go, the Spenard Rec Center, nobody listened to her. They went where they wanted to go.

They didn't care what she said. So why is it that suddenly when they're out to Earthquake Park, [K.G.] gets to control where they go

* * * *

[Exhibit B to Complaint]

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-S97-0636 CI
T/V 3AN-93-2339 CR

WILLIAM OSBORNE,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

ORDER FOR MOTION FOR
PRESERVATION OF THE EVIDENCE
(unopposed)

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of a crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

IT IS HEREBY ORDERED that the State of Alaska shall preserve all the evidence in this case.

IT IS FURTHER HEREBY ORDERED that the State of Alaska cannot destroy any evidence in this case without the permission from the superior court

and that Osborne must be given notice and sufficient time to respond to such a request.

ENTERED this 20th day of August, 2002, at Anchorage, Alaska.

/s/ Sharon Gleason
Superior Court Judge

IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

WILLIAM OSBORNE,	)	
	)	
Appellant,	)	Case No. A-08399
	)	Sup. Ct. Case No. 3AN-97-0636 CI
v.	)	
	)	Tr. Ct. No. 3AN-93-2339 CR
STATE OF ALASKA,	)	
	)	
Appellee.	)	

APPEAL FROM THE DECISIONS OF THE SUPERIOR COURT FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT DATED APRIL 23, 2001, BY JUDGE GLEASON THE DENYING DNA TESTING; THE ORDER DENYING AN EVIDENTIARY HEARING AND DETERMINING THAT OSBORNE HAD NOT ESTABLISHED A *PRIMA FACIA* CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL DATED JUNE 20th, 2002; and ORDER DENYING THE MOTION FOR RECONSIDERATION AND FINDING THERE IS NO STATE OR FEDERAL DUE PROCESS RIGHT TO RE-TESTING DATE SEPTEMBER 16, 2002

OPENING BRIEF OF APPELLANT OSBORNE

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of a crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

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FILED 9/15/03
in the Court of Appeals for the
STATE OF ALASKA

CLERK OF THE APPELLATE COURTS

By: /s/ Beth Meyer
Deputy Clerk

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AUTHORITIES PRINCIPALLY RELIED UPON

AS 09.25.051. Admissibility of DNA profiles.

(a) In a civil action or proceeding, evidence of a DNA profile is admissible to prove or disprove any relevant fact if the court finds that the technique underlying the evidence is scientifically valid. The admission of the DNA profile does not require a finding of general acceptance in the relevant scientific community of DNA profile evidence.

(b) In this section,

(1) "deoxyribonucleic acid" means the molecules in all cellular forms that contain genetic information in a patterned chemical structure for each individual;

(2) "DNA profile"

(A) means an analysis of blood, semen, tissue, or other cells bearing deoxyribonucleic acid resulting in the identification of the individual's patterned chemical structure of genetic information;

(B) includes statistical population frequency comparisons of the patterned chemical structure described in (A) of this paragraph. (§ 1 ch 7 SLA 1995)

AS 12.45.035. Admissibility of DNA profiles.

(a) In a civil action or proceeding, evidence of a DNA profile is admissible to prove or disprove any relevant fact, if the court finds that the technique underlying the evidence is scientifically valid. The admission of the DNA profile does not require a finding of general acceptance in the relevant scientific community of DNA profile evidence.

(b) In this section,

(1) "deoxyribonucleic acid" means the molecules in all cellular forms that contain genetic information in a patterned chemical structure for each individual;

(2) "DNA profile"

(A) means an analysis of blood, semen, tissue, or other cells bearing deoxyribonucleic acid resulting in the identification of the individual's patterned chemical structure of genetic information;

(B) includes statistical population frequency comparisons of the patterned chemical structure described in (A) of this paragraph. (§ 1 ch 7 SLA 1995)

AS 12.72.040. Burden of Proof in post-conviction relief proceedings.

A person apply for post-conviction relief must prove all factual assertions by clear and convincing evidence.

AS 22.07.020. Jurisdiction.

(a) The court of appeals has appellate jurisdiction in actions and proceedings commenced in the superior court involving

(6) probation and parole; and

AS 22.20.200. DNA evidence information.

The judicial council shall periodically review and distribute information relevant to the technical, legal, and scientific use of deoxyribonucleic acid (DNA) profiles in criminal proceedings to

(1) judges and magistrates;

(2) the Department of Law;

(3) the Public Defender Agency;

(4) the office of public advocacy.

AS 44.41.035. DNA identification system.

(a) To support criminal justice services in this state, the Department of Public Safety shall establish a deoxyribonucleic acid (DNA) identification registration system.

(b) The Department of Public Safety shall collect for inclusion into the DNA registration system a blood sample, oral sample, or both, from (1) a person convicted of a crime against a person, (2) a person convicted of burglary or a felony attempt to commit burglary, and (3) a minor 16 years of age or older, adjudicated as a delinquent for an act that would be a crime against a person, a burglary, or a felony attempt to commit burglary, if committed by an adult. The DNA identification registration system consists of the blood or oral samples drawn under this section, any DNA or other blood grouping tests done on those samples, and the identification data related to the samples or tests. Blood samples and oral samples, and the identification data related to the samples or tests. Blood samples and oral samples from person not subject to testing under this section, and test or identification data related to those samples, may not be entered into, or made a part of, the DNA identification registration system.

(c) The Department of Public Safety may provide

(1) DNA analysis services to law enforcement agencies throughout the state; and

(2) assistance to law enforcement officials and prosecutors in the preparation and utilization of DNA evidence for presentation in court.

(d) Except as provided in (e) of this section, a local law enforcement agency may not establish or operate a DNA identification registration system unless

(1) the equipment and the DNA typing method of the local system are compatible with that of the state system under (a) of this section;

(2) the local system is equipped to receive and answer inquiries from the department's DNA identification registration system and transmit data to the department's DNA identification registration system; and

(3) procedure and rules for the collection, analysis, storage, expungement, and use of DNA identification data do not conflict with this section and procedures and rules applicable to the department's DNA identification registration system.

(e) Nothing in (d) of this section prohibits a local law enforcement agency from performing DNA identification analysis in individual cases to assist law enforcement officials and prosecutors in the preparation and use of DNA evidence for presentation in court.

(f) The DNA identification registration system is confidential, is not a public record under AS 40.25.110 - 40.25.140, and may be used only for

(1) providing DNA or other blood grouping tests for identification analysis;

(2) law enforcement purposes including criminal investigations and prosecutions;

(3) statistical blind analysis; or

(4) improving the operation of the system.

(g) A person from whom a sample has been collected under this section may inspect and obtain a

copy of the identification data regarding the person contained within the DNA identification registration system.

(h) The Department of Public Safety shall adopt reasonable procedures

(1) for the collection, analysis, storage, expungement, and use of the DNA identification registration system; and . . .

Constitution of Alaska, Article I, §7. Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Constitution of Alaska, Article I, §11. Rights of Accused.

In al criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of records. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evidence or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel; for his defense.

Alaska Rules of Appellate Procedure 202. Judgments from Which Appeal May Be Taken.

(b) An appeal may be taken to the court of appeals from a final judgment entered by the superior or the district court, in the circumstances specified in AS 22.07.020.

Constitution of the United States, Amendment XIV. Citizenship rights not to be abridged by states.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment IV.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

JURISDICTIONAL STATEMENT

Osborne appeals from the denial of post-conviction relief. The trial court dismissed his PCR without hearing on June 20, 2002. Osborne appeals the denial of access to the biological evidence in the case for post-conviction DNA testing.

This appeal is brought as a matter of right pursuant to AS 22.07.020(a). This court has jurisdiction over this appeal pursuant to AS 22.07.020(a)(6) and Rule 202(b) Alaska R. App. P.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err as a matter of fact and law in denying counsel access to the evidence during the PCR review?

2. Did the trial court err in the fact finding process that Billingslea's refusal to test the evidence was strategic and therefore she was not ineffective?

3. Did the trial court err as a matter of law in not ordering a hearing whether Billingslea was ineffective as to DNA evidence?

STATEMENT OF THE CASE

Osborne was convicted of kidnapping, sexual assault and physical assault. The conviction was predicated upon a problematic identification by the complaining witness. [Tr. 482-484, 1408] This identification was bolstered by the prosecution's argument that DQ-Alpha DNA testing definitively linked Osborne to K.G. based on the serology of the condom. [Tr. 1506] In addition, that Osborne's pubic hair was consistent with the ones on the condom and sweater. [Tr. 871-2] Osborne wanted his appointed counsel to have the condom tested further; however, she refused. Trial counsel for Osborne never consulted any independent experts concerning the DNA testing proffered by the prosecution. Billinslea agreed if the semen test excluded Osborne as a donor, the outcome would be materially affected. [Exc. 377] Osborne was convicted.

Osborne filed a petition for post-conviction relief. The trial court refused access to the physical evidence during the initial review process. The trial court also refused to allow DNA testing of the condom in order to see whether trial counsel was correct in refusing Osborne's explicit request. The trial court also refused to allow Osborne to test the items seized with the latest DNA technology or recognize his due process or *Brady* claim to the evidence. The petition for post-conviction relief was dismissed as the court viewed Osborne had failed to establish a *prima facia* case.

STANDARDS OF REVIEW

1. A person applying for post-conviction relief must prove all factual assertions by clear and convincing evidence. AS 12.72.040.

2. Whether an attorney's performance constitutes ineffective assistance of counsel is a mixed question

of fact and law. *State v. Laraby*, 842 P.2d 1275, 1280 (Alaska App. 1992).

3. A trial court's denial of post conviction relief is reviewed to determine whether an abuse of discretion occurred. *Brown v. State*, 803 P.2d 887, 888 (Alaska App. 1990).

4. The reviewing court accepts the trial court's findings of fact unless they are clearly erroneous; the trial court's conclusions of law are reviewed *de novo*. *Jackson v. State*, 750 P.2d 821, 825 (Alaska App. 1988); *Arnold v. State*, 685 P.2d 1261, 1265-65 (Alaska App. 1984).

ARGUMENT

I. PREFACE

> The American criminal justice system rightly sets the ascertainment of truth and the protection of innocence as its highest goals. The average school child is aware (or so we hope) that the accused is clothed with a presumption of innocence and that the prosecutor must prove beyond a reasonable doubt that a crime was committed. Moreover, the concern with innocence does not end at trial. Elaborate post-cónviction procedures are rightly in place to ensure not only that a trial was fair, but also that no individual has been wrongly convicted.

Harvey v. Horan, 258 F.3d 298 (4th Cir. 2002) (Denying rehearing on post-conviction DNA testing under a 1983 federal theory) Horan later achieved the testing, but it did not exculpate him.

In considering this matter, there are a number salient points that need to be kept in mind. First, Alaska has no statute or case law governing post-

conviction DNA testing even though the national standards were being promulgated back in 1999. Second, Osborne has maintained his innocence and prior to trial, he wanted the fluid in the condom tested for greater specificity as to its makeup. Third, his lawyer denied his requests for further testing over his objection. Thus, she denied him a proper investigation and exculpatory evidence. The requested testing would produce new, non-cumulative evidence materially relevant to the Osborne's assertion of actual innocence.

Fourth, there have been dramatic improvements in DNA testing techniques since this case was tried. Less organic or genetic material is now needed in order to have a more accurate result. A much newer technology—mtDNA testing—is likely to secure a genetic profile where DQ Alpha testing previously failed. This includes from hair. See National Institute of Justice, U.S. Department of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* at 60 (hereinafter "N.I.J. Report") (stating that if the DNA sample to be tested is a hair shaft, nuclear DNA testing will not achieve a result). However, mtDNA testing is capable of producing a result on a hair shaft or other hair fragment even when DQ Alpha testing and other nuclear DNA testing methods cannot produce a result.[1] This is because, unlike

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[1] There are two types of DNA found in a human cell. The DNA that resides in the nucleus of the cell is called nuclear DNA. There is also a chromosome of DNA outside the nucleus lodged in an organelle called the mitochondrion. This is the mitochondrial DNA or mtDNA. Each mitochondrion contains eight or ten chromosomes. There is, therefore, a greater quantity of mtDNA available for forensic examination than there is nuclear DNA. MtDNA is also more resilient than nuclear DNA; for example, in a number of cases, old teeth, bones or hair that have

nuclear DNA testing, mtDNA testing does not require the presence of a hair root or follicle. *State v. Council*, 515 S.E.2d 508, 516 (S. Car. 1999). *See* N.I.J. Report at 107. The results of mtDNA testing are widely admissible in American courts. *See, e.g., State v. Pappas*, 776 A.2d 1091 (Conn. 2001); *State v. Underwood*, 518 S.E.2d 231 (N. Car. 1999). Even if the fluid from the condom is degraded, Osborne can now have the hair found tested to show he was not the source of the pubic hair on either the sweater or the condom.

Fifth, in excess of a hundred and thirty people have been freed from incarceration due to post-conviction DNA testing. Osborne is not an isolated cry in the wilderness. Cases just like his have been reversed for precisely the same reasons presented to this court. This opinion will have a great impact to others who are in the same position as Osborne, convicted on the less than perfect science from the 1980's and early 1990's.

Finally, eyewitness identification has always been viewed critical and problematic by the law. As noted in *Skamarocius v. State*, 731 P.2d 63, 67 (Alaska 1987), the defendant's identity as the perpetrator of an offense is always an element of the crime. The legal community has long recognized that eyewitness identification can be untrustworthy and lead to wrongful convictions. *State of Alaska v. Contreras*, 674 P.2d 792, 799-801 (Alaska App. 1983); *Watkins v. Sowders*, 449 U.S. 341, 350 (1981) (Brennan, J. dissenting); *United States v. Wade*, 388 U.S. 218, 228

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been exposed to environmental wear and tear have been found to have sufficient mtDNA for purposes of forensic examination, even though nuclear DNA typing, like an STR DNA test, would fail to get a result.

(1967) ("The vagaries of eyewitness identification are well known: the annals of law are rife with instances of misidentification"); *Jackson v. Fogg*, 589 F.2d 108, 112 (2d Cir. 1978).

II. COURSE OF PROCEEDINGS

William Osborne and Dexter Jackson were charged with Attempted Murder in the First Degree, Kidnaping, Sexual Assault in the First Degree, Assault in the First Degree and Assault in the Second Degree [Exc. 1-13] The two men were indicted on the same charges. [Exc. 14-22]

Osborne denied involvement and was represented at trial by Sid Billingslea through the Office of Public Advocacy. Jackson was represented by Rex Butler. The two men jointly went to trial before Judge M. Souter. Osborne's defense was that it was misidentification by K.G. and that he was at the Space Station at the time she was picked up by Jackson at 9:00 p.m. [Tr. 396] Numerous witnesses at the trial stated Osborne was with them at the time of the offense. [Tr. 1239, 1240, 1219, 1282, 1322, 1682, 1692] Jackson claimed consensual sex between himself and K.G. As noted in the memorandum and judgment, blood matching K.G. was found in Jackson's vehicle.

On March 22, 1993, K.G., an admitted prostitute, was soliciting customers in the Spenard Road area of Anchorage, Alaska around 9:00 p.m. She was not wearing her glasses and ". . . wasn't quite in focus". (Tr. 396). K.G. agreed to perform fellatio for $100.00 on two men who approached her. (Tr. 400). The three drove off looking for a secluded area in which to park. They had spent some of the time driving in and out of prospective areas. Once parked, the two men forced K.G., at gunpoint, to perform fellatio on the male

driver while the male passenger penetrated K.G. vaginally. (Tr.400-403). The passenger wore one of the condoms K.G. had with her while he vaginally penetrated K.G. and ejaculated. (Tr. 407-408, 409). It was K.G.'s testimony and the prosecution's theory that Osborne was the passenger. (Tr. 445, 10, 19, 1913, 1925-26, 1950)

Afterwards, K.G. attempted to gather her clothing and leave, but she was choked. (Tr. 410). K.G. struggled out of the vehicle and again attempted to gather her clothing, but her attackers caught up with her and beat her with a blunt instrument. (Tr. 410, 414, 428). The attackers fired a bullet in K.G.'s direction which grazed her. (Tr. 438).

On March 28, 1993, six days after the attack on K.G., military police officers pulled Jackson over on Fort Richardson for flashing his headlights at another vehicle. (Tr. 702-703). Jackson had a gun in his glove compartment and a Swiss army knife in his possession. (Tr. 929-30, 941). The military officers then contacted the Anchorage Police Department because Jackson's car was the same make, model and color as the car used in the attack on K.G.

The two men were convicted. [Exc. 23-27] Osborne was convicted on the charges of Kidnapping, 2 counts of Sexual Assault in the First Degree, and Assault in the First Degree. Specifically, the counts were: IV, VI, VII, IX. The jury rejected the rest of the charges, including Attempted Murder in the First Degree.

Osborne and Jackson appealed and their convictions were affirmed by the Court of Appeals. The Court of Appeals found, "[de]spite Osborne's painstaking reconstruction of the temporal evidence presented at trial, the evidence was sufficient to show

the acts occurred." The Court of Appeals noted that ". . . a jury could reasonably believe K.G.'s testimony that the assault occurred and conclude beyond a reasonable doubt that Osborne was present during the assault despite inconsistencies and uncertainties in the witnesses' estimation of time". The Court of Appeals also denied Osborne's claim that there was insufficient evidence to support K.G.'s identification of him. [Exc. 28-45]

Osborne petitioned to the Alaska Supreme Court and it was denied. A petition for post-conviction relief was filed. Mark Nunn was appointed and nothing was done on the PCR. Osborne's present counsel had the PCR reopened.

A report to the court was filed by counsel. [Exc. 46-74] Osborne claimed that Billingslea was ineffective as counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The initial report by counsel indicated there was no ineffective assistance of counsel by trial counsel *but* Osborne may want testing with the new techniques. [Exc. 64] Osborne, in response to counsel's report to the court, drafted his own report. In his report, he stated that Billingslea failed to test the DNA evidence. [Exc. 94-95] Billingslea did not want to have the evidence tested. [Exc. 98] Billinslea does not contest this point. [Exc. 353] Osborne wanted to have the evidence tested with the more specific testing: RFLP. [Exc. 98] Osborne even went to the length of writing to an expert prior to trial in an effort to help him. [Exc. 96] In response to this new information, counsel for Osborne moved to have the biological evidence tested and argued in light of the new information that Billingslea was ineffective for failing to examine potentially exculpatory evidence. [Exc. 75-102]

The motion contained an affidavit from Osborne stating that Billingslea told him there was no budget for an expert or independent testing. [Exc. 95] Billingslea denied making such a statement in her December 11, 2001 affidavit. [Exc. 461] She confirmed that Osborne wanted another opinion. She also confirmed that he wanted additional testing. [Exc. 350-354] The trial court denied the motion for post-conviction DNA testing on April 23, 2001. [Exc. 103].

Counsel for Osborne then filed a "Final Report to the Court" in light of the *Griffin* case. [Exc. 104-313] The report pointed out the flaws inherent in hair and trace evidence that was used to convict Osborne years before. [Exc. 124-135] The report also detailed how it would have been impossible, given the time line of events from some witnesses, for Osborne to have committed the crimes attributed to him. [Exc. 114-117] Counsel also attached the "Post-Conviction DNA Testing: Recommendations for Handling Requests" reported that was generated by the Department of Justice in 1999 through a commission. [Exc. 185-313] It was urged that an evidentiary hearing be held and DNA testing be done. No hearing was held and no DNA testing was done. [Exc. 146] Osborne filed his response to counsel's brief contesting various issues such as posse comitatus and failure to investigate. [Exc. 314-349]

Osborne then filed a notice of the availability of mitochondrial DNA testing for the pubic hair. [Exc. 355-373] This was in case the fluids on the condom were degraded or unavailable.

The trial court, after reviewing the PCR, denied counsel's access to the evidence. Counsel moved for an evidentiary hearing on December 12, 2001. [Exc. 448-450] This was not granted. Counsel provided

trial court with correspondence from Professor David Kaye, who is a specialist in the area of DNA and the law. [Exc. 451-458] Professor Kaye opined that the "defense counsel could have done more" and had further testing done. Also, experts could have been retained to check the criminalist's work and statistics. Professor Kaye concluded that further testing could be done on the condom and that it would exonerate Osborne if he was innocent unless there was cross-contamination. [Exc. 458]

The State of Alaska argued there was *no mechanism* for post-conviction DNA testing. [Exc. 386] Osborne disagreed stating the civil mechanisms for discovery applied. [Exc. 389] Osborne then amended his claim to include that he had a right to post conviction DNA testing on due process grounds. [Exc. 410-440] It should be noted that Don Kitchens, counsel for the prosecution, wrote "If defendant wants the evidence re-tested he is free to file a Writ of Habeas Corpus and seek relief in that arena." [Exc. 470] This was in contradiction to Ms Cooper's, then assistant attorney general, publicly stated belief. [Exc. 89-93]

Osborne also filed the affidavit of Sharon Barr. Ms. Barr briefly had contact with Osborne while employed at OPA. Osborne indicated to her that Jackson picked him up *after* the incident. [Exc. 441-447]

The trial court entered a dismissal order. [Exc. 529-537] The court found that there was no ineffective assistance of counsel. Nor was Osborne allowed to avail himself of new DNA techniques under a due process theory. Osborne moved for reconsideration and clarification of the order that was issued by Judge Gleason. [Exc. 538-606] This too was denied. [Exc. 621] Therefore, this appeal was filed.

A. TIME LINE OF EVENTS FROM THE TRIAL.

The time line indicates that it was *impossible* for Osborne to be the perpetrator of the crime. K.G. stated she was picked up around 9:00 p.m. and arrived home about 10:30 p.m. (Tr.396, 478) This was supported by Greg Saraf. (Tr. 313). Both Albert Mills and Donna Rhyne's testimony also supported K.G. being picked up at the crime scene and arriving back at her residence between 10:30 p.m. and 11:00 p.m. (Tr. 67, 83).

The Space Station video tape had Osborne still at the business at 9:28 p.m. (Tr. 1394, Exh. 152). Witnesses had Osborne still with them *after* the time K.G. stated she was picked up by Jackson in the red car. John Riley stated that Osborne was with him between 9:30 and 9:45 p.m. (Tr. 1239) It was on Fireweed, after leaving the Space Station, that Jackson pulled up and Osborne left with him. (Tr. 1240, 1219) Cedric Robinson was with Osborne at 9:45 p.m. and they pulled out of Space Station at approximately 10:00 p.m. (Tr. 1282, 1322). Finally, Evangeline Sefulu stated she met Osborne on the night in question in the Space Station parking lot. She was talking to him at 9:30 p.m. and for 15 minutes. (Tr. 1682, 1692)

B. K.G.'S PROBLEMATIC EYEWITNESS IDENTIFICATION OF OSBORNE.

K.G's identification of Osborne was problematic for a variety of reasons and fraught with critical inconsistencies. This court must view Osborne's identification by K.G. as unreliable and order further dna testing.

First, K.G. was understandably very upset at the time of the assault and this makes her observations unreliable. According to Mills, K.G. was upset or dis-

traught at the time of the incident. (Tr. 67, 75) and she was worried about a possible warrant for her arrest. (Tr. 67). Rhyne concurred that K.G. was "rattled", and pretty upset and shaky. (Tr. 81, 97) Detective Branchflower agreed her demeanor was distraught. (Tr. 228) Greg Saraf stated K.G. was in "shock" when she got home. (Tr. 314)

Second, K.G. was a reluctant witness that did not want to give Detective Branchflower information about the matter. (Tr. 227) K.G. would not give details or information and was angry. (Tr. 228, 396) In fact, she initially denied to Branchflower she was prostituting herself and had a crack pie in her sock. (Tr. 438, 607) She initially *lied* by telling the police she was hitchhiking to a friend's place when she was picked up. (Tr. 557) K.G. was carrying her crack pipe in her sock and stated she had not had any crack for several days. She admitted it was very addictive and wanted it every day. (Tr. 533)

Third, K.G. told Detective Branchflower that the passenger had *no* facial hair. (Tr. 274) Osborne had facial hair. Witness Riley testified that Osborne had a moustache at the time of the alleged assault. (Tr. 1235) Detective Gray took pictures of Osborne within days of the assault and admitted Osborne had a mustache. (Tr. 795) Brian Ritchie stated that Osborne had a mustache at the time in question. (Tr. 1649)

Fourth, the only light used by her to observe the two men was the dome light in the vehicle. (Tr. 537, 408) It was dark, but K.G. argued the dome light was enough to observe the men. (Tr. 537) This low light would not support an accurate observation. According to www.sunrisesunset.com, the sunset in Anchorage, Alaska on March 22, 1993 at 7:17 p.m. That means K.G., given her statement she was picked up at 9

p.m., was picked up an hour and 43 minutes after sunset.

Fifth, at trial, K.G. testified that the male passenger who attacked her was black, 6 feet tall, weighed 180-190 pounds, was clean shaven, with his head hair shaven on the sides and longer on top. (Tr. 482-484) She thought he was 25-30 years old. (Tr. 280) K.G. also reported that the passenger was not wearing jewelry. (Tr. 483). K.G. further testified that, at a police lineup after the incident, she identified Osborne as the member of the photographic lineup who was "most familiar" (along with others) to her and the "most likely" to have been the male passenger who attacked her. (Tr. 484, 782) At trial, K.G. pointed to Osborne and identified him as the passenger who attacked her. (Tr. 445)

K.G.'s description of Osborne was contradicted by the *objective* information on the arrest warrant generated by Detective Branchflower. The detective noted in her arrest warrant application that Osborne was black, 21 years old, 5-9 and 155 lbs. (Tr. 1408) Thus, K.G. was up to 9 years off in her age estimate, 3 inches off in height, and up to 45 pounds off in weight of the alleged assailant. (Tr. 1408-9) Jim Backus, the Space Station security guard, noted that Osborne was black and had a pager on him that night. (Tr. 1310).

When Branchflower initially showed K.G. Jackson's vehicle, she did not recognize it. (Tr. 378) K.G. claimed she lost a *blue* deck of cards in the vehicle. In the vehicle was a *red* deck of cards. (Tr. 382)

Sixth, K.G. had poor eye sight. She admitted could not see very well without her contacts. K.G. agreed she was not wearing her glasses or contacts at the

time of the assault. (Tr. 481) Dr. Steven Dobson examined K.G.'s 3 year old eye records and stated her eye sight was between 20/300 and 20/400 at the time of the assault. (Tr. 1725).

Seventh, K.G. suffered a head injury according to Dr. Hudson. (Tr. 617) K.G. thought she possibly might have lost consciousness. (Tr. 477, 563) K.G. testified at trial that at the time of assault, ". . . things seemed distorted". (Tr. 482) Finally, Dr. Garry noted that some of the factors effecting observation and memory is cross-racial and stress. (Tr. 1607-1608) Although there are references that Osborne is black, it will not be contested that K.G. was white.

With these eight points irrefutably established, it clear that K.G.'s statement that Osborne was one of her assailants is unreliable especially in light of the fact that other witnesses place Osborne with them at the time of the pick up.

The current literature and case law on eye witness identification supports Osborne's contention that K.G.'s in court identification of him should be viewed as suspect and unreliable. Despite its apparent force, identification of the perpetrator by the victim of a crime can be extraordinarily unreliable. *See* Gary L. Wells, *et al.*, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 1, 1-3 (1988) (explaining that "eyewitness testimony is among the least reliable forms of evidence and yet persuasive to juries"). And, there is increasing evidence that mistaken eyewitness identification is one of the primary causes of wrongful convictions. *See* Elizabeth Loftus, *Ten Years in the Life of an Expert Witness,* 10 Law & Hum. Behav. 241, 243 (1986) (estimating that half of all

wrongful convictions are caused by mistaken eyewitness identifications).[2]

In addition, although conventional wisdom suggests that stress enhances a witness' ability to perceive and remember a perpetrator's physical characteristics, *see, e.g.*, *Commonwealth v. Roddy*, 39 A. 211 (Pa. 1898) (stating that where assailants tied up a witness and his wife and threatened to shoot the witness "every particularity of each of [the assailants] must have been literally burned into the memory of both [the witness] and his wife"), scientific studies show that the opposite is true and that "[a]ll other factors being equal, a witness in a high stress situation is more likely to be an unreliable witness than one not under such stress." *See* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 Am. Crim. L. Rev. 1013, 1023 (1995); *see also* Otto H. MacLin, et al., *Race, Arousal, Attention, Exposure and Delay: An Examination of Factors Moderating Face Recognition,* Psychol., Pub. Pol'y & Law, March 2001 Vol. 7, No. 1, 134-52 (stress decreases an observer's ability to identify the person observed).

Eyewitness identifications are particularly unreliable when, like in this case, there is a disparity between the race of the perpetrator (black) and the race of the victim (white). It is widely accepted that people are worse at identifying individuals of a different

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[2] The U.S. Department of Justice released a study of 28 cases in which individuals were wrongfully convicted and later exonerated by DNA. In every case, except for homicides, the victim(s) identified the defendant prior to trial and at trial. Edward Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial,*

race than they are at identifying individuals of their own race. *See* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 Am. J. Crim. L. 207, 209-12 ("it is well documented that cross-racial identification is less reliable than identification of one person by another of the same race"). This phenomenon is called the "other-race effect" and is thought to have a significant impact on eyewitness reliability in the context of criminal prosecutions. Gary L. Wells & Elizabeth A. Olsen, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It*, Psychol., Pub. Pol'y & Law, March 2001 Vol. 7, No. 1, 230, 231.

It is uncontested fact that Osborne is black and K.G. is white. Unlike eyewitness identification, DNA evidence is immune to imperfections of perception and memory. DNA testing has the power to prove, conclusively, whether Osborne was one of the men who physically and sexually assaulted K.G.

C. BIOLOGICAL EVIDENCE.

Following the incident, the Anchorage Police Department investigated the scene of the assault to secure evidence. (Tr. 107-108). In the bloody snow where K.G. was beaten, the police recovered the blue condom used in K.G.'s rape, as well as a condom wrapper, a spent shell casing, and two pairs of K.G.'s bloody gray knit pants that K.G. had worn the night of her attack. (Tr. 16,108)

K.G. was taken to the hospital by the investigating detective, Branchflower. (Tr. 233-34). A rape protocol kit was collected, but only hair and blood samples were collected from K.G. At trial, Detective Branchflower testified that a vaginal examination was not requested or performed for two reasons. First, she did

not suspect any semen would be found in the victim's vagina because the rapist wore a condom at the time of K.G.'s assault. (Tr. 238-239). Second, Detective Branchflower testified that K.G. had showered since her attack. (Tr. 239).

1. Semen Evidence

At Osborne's criminal trial, Lee Ann Strickland, a serologist with the Alaska State Crime Lab, testified about her examination of the condom from the scene of the attack that revealed intact spermatozoa. (Tr. 150-54)

At trial, Strickland further testified that she performed DQ Alpha type DNA testing on the spermatozoa and that the spermatozoa revealed a DQ Alpha profile of 1.2, 4. (Tr. 1504). Strickland concluded that Osborne was one of the 14.7%-16% of the black population who exhibited this same DQ Alpha DNA profile. (Tr. 1506). This is no more discriminating a test than conventional serology. The frequency of ABO type B and type AB in the black population is even lower than the DQ Alpha profile identified from the condom. In contrast, the current 13 STR marker DNA test used in Alaska and throughout the country, will generate a nearly unique profile for each individual. Instead of a frequency of 14.7%, a 13 marker STR DNA profile will have a frequency no higher than one in a billion. Thus the ability of the new STR test to exclude everyone but the real perpetrator is extraordinary.

State crime lab analyst Lee Ann Strickland also testified that she tested K.G.'s clothing for the presence of semen. (Tr. 1490-1491). Specifically, Strickland examined K.G.'s outer sweater which was placed under K.G. while she was raped and Strickland found

that the sweater effloresced, indicating the likely presence of semen. (Tr. 1493). Strickland also tested K.G.'s brown and white sweater and K.G.'s multi-colored turtleneck. Strickland testified that both of these articles of clothing also effloresced, indicating the likely presence of semen. (Tr. 1493-1496)

2. Hair Evidence

At trial, Janeice Fair, a criminalist in the Alaska State Crime Laboratory, testified at Osborne's criminal trial that she microscopically examined hair evidence from the crime scene. Fair testified that a "negroid" pubic hair found on the sweater that was spread beneath K.G. while she was raped was characteristically similar to Osborne's pubic hair. (Tr. 870-872). Fair further testified that she examined a "negroid" pubic hair found on the condom that was retrieved from the scene of the assault, and she concluded that this hair also exhibited the same characteristics as Osborne's pubic hair. (Tr. 871-872).

State crime lab analyst Lee Ann Strickland further testified about her examination of hair evidence recovered from the crime scene. Strickland testified that she examined both the hair from K.G.'s sweater and the hair from the condom, but was unable to obtain a DQ Alpha DNA profile from either hairs' shaft or root. (Tr. 1470)

3. State's Use of Biological Evidence Against Osborne

During its opening statement, the State attributed biological evidence from K.G.'s attack to Osborne. Specifically, the prosecutor repeatedly referred to the blue condom that K.G. had in her purse on the evening of her attack that was used in her sexual assault and which was later recovered from the crime scene.

(Tr. 10). And, the prosecutor unequivocally stated that Osborne wore this condom when he vaginally penetrated K.G. (Tr. 10, 19). The prosecutor stated that "Osborne penetrated her vaginally with his fingers and then with his penis. He wore the blue condom." (Tr.10).

The State also asserted that hair evidence definitively implicated Osborne in the attack on K.G. The State emphasized that pubic hairs found on both the condom and the sweater that was underneath K.G. while she was raped matched Mr. Osborne's pubic hair. (Tr. 19).

In its closing, the State again asserted that the hairs found on the blue condom and on the sweater that was spread beneath K.G. were Osborne's and conclusively linked him to the attack on K.G. (Tr. 1925-1926). In its closing remarks, the State emphasized that "[K.G.] was carrying condoms that night in a blue foil packet, and part of the wrapper was found right by the blue condom that had William Osborne's semen in it." (Tr. 1913). The prosecutor stated "Osborne left his semen at the scene." [Tr. 1950] The State unequivocally argued "[this] is very damning evidence. It turned out to be incredibly damning with both [Osborne's] pubic hair and his semen on the condom." (Tr. 1950)

III. DNA EVIDENCE AND TESTING

A. IN ALASKA.

Alaska has a long history with DNA evidence, and it is well recognized that DNA test results have strong evidentiary value. This value was recognized by the Alaska Legislature. There is a statute that mandates prisoners to give DNA samples when they are convicted of certain crimes. AS 44.41.035. DNA

profiles can be admitted to prove or disprove any relevant fact. AS 9.25.051; AS 12.45.035. The Alaska Judicial Council is also *mandated* to periodically review and distribute information to various parties including the criminal defense bar on the use of DNA profiles in criminal proceedings. AS 22.20.200. There is no post-conviction DNA testing statute in Alaska. A report issued in 1996 by the judicial council entitled "Use of DNA profiles in Criminal Proceedings in Alaska" makes no mention of post-conviction DNA testing.

The admissibility of DNA evidence has also received appellate review several times. In *Harmon v. State*, 908 P.2d 434 (Alaska App. 1995), the issue of DNA evidence was initially examined. Two types of DNA testing were at issue in the *Harmon* case: restriction fragment length polymorphism (RFLP) and polymerase chain reaction typing (PCR). *Id.* at 438. After an exhaustive review of the history and technical aspects of DNA testing, the Court of Appeals found the two types of testing used in the *Harmon* trial were generally accepted in the scientific community. The court ruled it was not an error to present DNA evidence at Harmon's trial. *Id.* at 443. The type of DNA testing performed in *Harmon* occurred at the same point in time as Osborne's trial. At that time, there is an even more exacting DNA test (RFLP) available.

In *Brodine v. State*, 936 P.2d 545 (Alaska App. 1997), the issue of the admissibility of DNA evidence again was examined in light of new testing procedures which were being developed. The new testing procedures, DQA or PCR HLA DQ-Alpha, were found to be generally accepted in the scientific community. *Id.* at 548. It was also found that D1S80 test, dealing

with alleles, and the polymarker test were generally accepted in the scientific community. *Id.* at 551-2.

The issue in *Grinols v. State*, 10 P.3d. 600 (Alaska App. 2000) was whether Grinols was barred from his successive claim of ineffective assistance of counsel under AS 12.72.020. The Court of Appeals considered the unfairness of AS 12.72.020 in light of DNA evidence. *Grinols* noted that several convictions had been reversed after DNA evidence had exonerated the defendants. *Id.* at 617. The court, in footnote 52, cited the case of *Youngblood*. Youngblood was convicted of sexually abusing a boy in 1983 and was cleared of the crime charged after 17 years in prison. The decision cited the cases of other men who were cleared after DNA testing in the same footnote. The Court of Appeals stated there was an *exception* to AS 12.72.020 for evidence that would prove factual innocence. *Id.* at 617. The trial court, in dismissing Osborne's PCR failed to take this statute into consideration.

Currently, the State of Alaska has at its disposal the latest in DNA testing. Instead of only testing for 6 markers, the State Crime Lab can test for 13 markers. The prosecution has access to CODIS (Combined DNA Index System), the national DNA data base of the Federal Bureau of Investigation. This topic was explored in an *Anchorage Daily News* article, dated February 4, 2001, by Sheila Toomey. [Exc. 89-93] Toomey's article outlined new changes in DNA testing in Alaska. Hayne Hamilton, of the State Crime Lab, stated that profiles can now be obtained with very small specimens. Cynthia Cooper, then head of the State Criminal Division, stated there have been post-conviction requests for DNA testing, and the State would not oppose the requests if the DNA was

truly exonerating. She added, "I would hate to have convicted the wrong person." The current position of the prosecution is currently at odds with the stated philosophy of the executive branch. [Exc. 89-93]

B. POST CONVICTION TESTING IN OTHER JURISDICTIONS

Other jurisdictions have reviewed whether the convicted has a right to post conviction DNA testing. At least twenty-five states have post-conviction DNA testing statutes.[3] It is clear there is a general consensus among our sister states (and under federal law) there is a due process right to post-conviction DNA testing of biological evidence if identity was an issue, evidence of guilt was not that strong and the evidence would be exculpatory or was materially relied up at the original trial.

Other states have judicially addressed post-conviction requests for DNA testing and have granted it. *New Jersey v. Thomas*, 586 A.2d. 250, 253-54 (1991); *Dabbs v. Vergari*, 570 N.Y.S. 2d 765 (N.Y. Sup. Cr. 1990); *Polk v. State*, 612 So.2d 381, 388 (Miss. 1992) (allowing post-conviction DNA testing. "Its inestimable value, however, lies in its potential to provide identification in criminal cases bordering on the absolute."); *Illinois v. Johnson*, (Ill. 2d 2002), the Illinois Supreme Court allowed post-conviction DNA resting as identity was an issue in the 1984 trial and the evi-

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[3] Arizona, Arkansas, California, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisana, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, Wisconsin, Utah. "Don't Believe everything you Read: A Review of Modern Post-Conviction DNA Statutes", Kathy Swedlow, 38 Cal. W. L. Rev. 355 (Spring 2002)

dence could be 'materially relevant'. The Illinois court also noted that the United States Constitution provides access to exculpatory evidence on collateral review citing *Kyles v. Whitley*, 514 U.S. 419 (1995); *Commonwealth v. Brison*, 618 A.2d 420 (1992) (approved post-conviction DNA testing); *Sewell v. State*, 592 N.E. 2d 705 (Indiana 1992) allowed post-conviction DNA testing where identity was an issue citing *Brady*. Also see *People v. Henderson*, (Ill. App. 3d 2003) [Released June 27, 2003]

Delaware has addressed post-conviction DNA issues in *Anderson v. State*, __A.3d__ (Delaware 2003) [Release date September 4, 2003]. The *Anderson* court noted that post conviction DNA testing has led to exonerations of over one hundred convicted defendants in other jurisdictions. The *Anderson* court also stated that identity is *always* an issue in a criminal trial unless the defendant admits having engaged in criminal conduct and relies on a defense such as consent or justification. Justice Berger of the Delaware Supreme Court observed there are two types of statutes. First is the New York statute, which a court will not allow post conviction DNA testing unless a court determines that if DNA testing had been conducted on the evidence and the results had been admitted, there exists a reasonable probability that the verdict would have been more favorable to the defendant. The second style is the Illinois statute. The Illinois statute only requires only that the result of the requested testing would have scientific potential to produce new, non-cumulative evidence materially relevant to the defendant's assertion of actual innocence.

The *Anderson* court, which was considering the appeals of three inmates, denied post-conviction DNA

testing for one inmate (Anderson) and ordered the trial court to reconsider the requests for DNA testing as to inmates Redding and Woods.

Florida allowed post-conviction DNA testing on pubic hair in a sexual assault case where identification was an issue. *Knighten v. Florida*, 829 So. 2d 249 (Fla. App. 2 Dist. 2002). Nebraska addressed the issue in *State v. Poe*, 266 Neb. 437 (2003). Poe was convicted of robbery based on the eye-witness testimony of two women back in 1990. One witness mentioned the robber smoked a cigarette. The police took the cigarette butt into custody. Poe sought DNA testing through Nebraska's post-conviction act. It was denied by the trial court. The Nebraska Supreme Court remanded it back for determination whether the testing "may produce evidence relevant to Poe's claim he was wrongfully convicted".

C. LAW REVIEW SCHOLARSHIP SUPPORTS POST-CONVICTION DNA TESTING.

Numerous law review articles that have been in favor of post-conviction DNA testing and should be viewed as persuasive authority. Jennifer Boemer, *"In the Interest of Justice: Granting Post Conviction Deoxyribonucleic Acid (DNA) testing to Inmate"*, 27 Wm. Mitchell L. Rev. 1971 (2001); Karen Christian, *"And the DNA shall set your free: Issues surrounding Post Conviction DNA Evidence and the Pursuit of Innocence"*, 62 Ohio St. L. J. 1195 (2001); *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev 1481 (1995); Seth Kreimer and David Rudovsky, *"Double Helix, Double Bind: Factual Innocence and Post Conviction DNA Testing"*, 152 University of Pennsylvania Law Review Volume 547(2002)(See Footnote 133 for the survey of cases concerning post-conviction DNA testing).

Osborne concedes that post-conviction DNA laws are complex and there is no unity amongst the states as to a variety of issues. "*A State by State Review of 'Post Conviction DNA Testing Statutes*'", Kathy Swedlow, Online Journal of Justice Studies, Volume 1, No. 1. January 2003. There are numerous questions in post-conviction DNA cases that Alaska has failed to address: 1) who may file; 2) the timing of the filing, 3) time limits of filing, and 4) whether the petitioner has a right to appointed counsel. Then there are the standards of materiality that must be demonstrated by the petitioner that have to be addressed in order to have testing done. Osborne believes the Illinois standard of materiality should be adopted by Alaska.

D. FEDERAL VIEW POINT ON POST-CONVICTION DNA TESTING.

Federal case law is supportive of granting post-conviction DNA testing. *Godschalk v. Montegomery*, 177 F. Supp. 2d 366 (E.D. 2001) (there is a due process right to access to genetic material for DNA testing). In *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997) the defendant urged his attorney to have the blood stained pants tested. His trial counsel refused. The Ninth Circuit reversed the conviction due to trial counsel's failure to examine potentially exculpatory evidence. *Id.* at 1011.

Federal recognition of the exonerating potential of DNA evidence was also codified legislatively. The 106 Congress passed legislation concerning the viability of post-conviction DNA testing. See Public Laws 106th 546 of 2000. Notes attached to U.S. Code Title 42 Section 14135. This was the "DNA Analysis Backlog Elimination Act of 2000". Section 11 of the notes to the act has Congress *expressly* recognizing

that DNA testing can conclusively establish guilt or innocence of a criminal defendant. Sec. 11(a)(2). It was recognized by Congress that the new testing measures that exonerated convicted inmates was *not unduly burdensome*. Sec. 11(a)(5-7). Congress also noted that States that receive federal monies should not deny the promise of truth and justice for both sides of the adversarial system that DNA testing offers. Sec. 11(a)(13).

In 1999 a report, commissioned by Janet Reno, was released by the National Commission on the Future of DNA testing, titled *POST CONVICTION DNA TESTING: RECOMMENDATION FOR HANDLING REQUESTS*. The report broke DNA requests into four categories. Category 1 cases are situations where the 1) biological evidence was collected 2) whether it still exists, and 3) if such evidence is subjected to DNA testing or retesting, exclusionary results will exonerate the habeas petitioner. According to the guidelines in the report, Osborne's case is one for allowing DNA testing because the DNA testing could exonerate him or would provide evidence that would materially undermine the confidence in the conviction.

IV. ISSUES

A. THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW IN DENYING COUNSEL ACCESS TO THE EVIDENCE DURING THE PCR REVIEW.

1. Facts

As previously discussed, Osborne wanted the evidence further tested. Billinslea refused. The evidence known to Billingslea amply supported the theory that Osborne was not present at the crime. Billingslea re-

fused to seek independent testing even after defense witnesses said he could not have committed the crime. Osborne has the right to post-conviction dna testing as part of the PCR process. It was the only way to evaluate the prejudice of his attorney's decision to deny him access to exonerating evidence. Also, in this situation, further testing of the biological evidence was a fundamental decision was for the client to make, not the attorney.

2. Law

First, the trial court erred as a matter of law in denying access to the evidence by Osborne. Osborne had set forth two theories for the testing of the biological evidence: 1) to see if Billingslea' decision to test the evidence was wrong; 2) that there is a due process basis for post-conviction dna testing. Judge Gleason's ruling in the denial on the motion for reconsideration that there was no due process right as a matter of law must be reviewed *de novo*. Osborne has a state and federal due process right and under *Brady v. Maryland* to do the post-conviction DNA testing to show that his attorney was wrong in denying him the reguested testing.

Second, Osborne established a *prima facia* case of ineffective assistance of counsel through his motions and affidavits. Specifically, that Billingslea should have had the condom tested in light of the objective evidence that Osborne could not have been with Jackson at the time of the assault at the park. The next step was to show how he was *prejudiced by her failure* to test the fluid from the condom. This created the necessity to have the condom tested at the PCR as part of discovery prior to an evidentiary hearing to determine whether the inaction of Billingslea prejudiced Osborne and whether it would have effected the

outcome of the trial. Judge Gleason's refusal to release the evidence prevented Osborne from establishing the prejudice aspect of his trial counsel's inaction.

Osborne contends the biological evidence had to be tested as part if the review of the case to evaluate whether Osborne received competent assistance of counsel. As noted in *Griffin v. State of Alaska*, 18 P.3d 71 (Alaska App. 2001):

> [A]n attorney representing a petitioner for post-conviction relief often must investigate the case anew, i.e., review documents from police files, interview or depose witnesses, and fully interview the petitioner to determine the petitioner's potential claims and to evaluate the arguable merit of those claims.

Osborne believes this review includes having biological evidence used against him at trial independently tested. This is especially true when trial counsel refused to independently test the evidence over the protestations of the client.

The trial court also erred as a matter of law when she ruled that Osborne no due process or *Brady* right to have access to the evidence. This decision was contrary to clearly established federal law. The United States Constitution provides access to exculpatory evidence on collateral review. *See Kyles v. Whitley*, 514 U.S. 419 (1995). Two federal cases indicate Osborne that should have been permitted to do the requested testing because trial counsel failed to test the evidence. First, in *Toney v. Gammon*, 79 F.3d 693 (8th Cir. 1996), the defendant was convicted of rape and sodomy. Toney filed a writ of *habeas corpus* alleging that he received ineffective assistance of coun-

sel. One of the points concerned his request for DNA testing of evidence that was in possession of the State. At the time of his conviction in 1982, DNA testing was not available. The Eighth Circuit ordered the DNA testing be done and stated that there was good reason for the testing. Toney had claimed he was innocent of the crime, and his attorney had failed to conduct the scientific examination of the evidence. The court reasoned that Toney was entitled to have access to the evidence for testing through discovery.

Second, in *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997), the defendant was convicted of murdering his wife. Jones claimed he was innocent and that someone else did the murder. Biological evidence, consisting of blood and hair, was recovered. Jones believed Busby, a neighbor, murdered his wife. The federal magistrate dismissed Jones' writ of *habeas corpus* without an evidentiary hearing and would not allow further discovery that included the testing of blood on the clothing. The Ninth Circuit reversed the district court and ordered that the testing of the clothing be done in order to establish the prejudice prong of the *Strickland* test. *Id.* at 1009.

Several cases and theories have been frequently cited as a basis for due process claims for post-conviction DNA testing. First, *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* has been held that the prosecution is obligated to turn over all favorable and material evidence in the possession of the State. Second is *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995) which extended *Brady* to information held by police investigators. Third, the Supreme Court determined in *United States v. Bagley*, 473 U.S. 667 (1985) that the due process right established in *Brady* is not limited to the traditional adversary process. The purpose of

Brady is also ". . . to ensure that a miscarriage of justice does not occur." *Bagley* at 675. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), in foot note 25, the Supreme Court noted that *after* a conviction, the prosecutor is bound by the ethics of his office to inform the appropriate authority of after acquired or other information that casts doubt upon the correctness of the conviction.

3. Argument

Trial counsel denied Osborne independent testing of the evidence against him. He was not allowed to fully cross-examine the results of the state's testing on the condom. Osborne contends this decision by his trial to test the condom fluid prejudiced him and was not reasonable under the circumstance. As this was established, Osborne then had to show how he was prejudiced by Billingslea's decision. The only way to do this is to have the condom materials now tested. Thus, in the interest of justice, the biological evidence should have been disclosed to Osborne for testing on federal due process grounds.

If the DNA testing comes back exonerating Osborne, then it completely discredits the original trial theory of the prosecution that he was the condom wearing passenger in the vehicle and sexually assaulted K.G. A negative DNA finding as to Osborne would have bolstered and corroborated his witnesses statements that he was not present when K.G. was sexually assaulted. It is not a far stretch for a jury to think that fellow soldiers were merely covering for one of their own and rejected their testimony.

4. Post-Conviction Conclusion

The trial court erred, as a matter of law, in denying Osborne post-conviction access to the evidence to as-

certain whether Billingslea's decision in denying Osborne's specific request for the more restrictive testing was prejudicial. The trial court's orders denied Osborne his *Brady* and due process rights. This court must issue an order stating that Osborne can have access to the biological evidence for testing in order to be in compliance with federal law.

B. THE TRIAL COURT ERRED IN THE FACT FINDING THAT BILLINGSLEA'S REFUSAL TO TEST THE EVIDENCE WAS STRATEGIC AND THEREFORE SHE WAS NOT INEFFECTIVE.

1. Facts

The critical facts related to DNA testing are that Osborne told his trial attorney, Billingslea, that he wanted to have the materials independently rested. [Exc. 0095] She does not contest this. [Exc. 353] Essentially, Billingslea denied the request because she did not believe her client's statements was innocent and was afraid of the results. As established earlier in this brief, Billingslea was aware that witnesses and the Space Station tape cleared Osborne from being with K.G. at 9:00 p.m.

As noted at trial, it was testified that a negroid pubic hair recovered was consistent with Osborne and not consistent with either James Hunter or Dexter Jackson. (Tr. 871-872) Nor was the fluid from the condom consistent with either Hunter or Jackson. (Tr. 1504-05) Blood was found in the vehicle. Lee Ann Strickland stated that it was consistent with K.G.'s DQ Alpha typing. (Tr. 1509-10) Semen found on a condom was only consistent with Osborne's DQ Alpha typing. (Tr. 1506) Strickland stated that there was no exact identification, but Osborne fits within a statistical group of 16 percent of black men as having the

same markers. (Tr. 1506) Both K.G. and the State of Alaska were adamant that Osborne was the passenger and used the condom. [Tr. 10, 19, 1913, 445, 1925-26 1950]

Osborne even sought to obtain an expert witness on his own by contacting Richard J. Roberts. Roberts' letter of October 5, 1993, provides some insight and even suggested the use of a mathematician to show the poor significance of the results proffered by Strickland. [Exc. 96] This information was presented to Billingslea. [Exc. 095] Therefore, Osborne has established a *prima facia* case of ineffective assistance of counsel that a minimally competent attorney would have had the condom further test under the facts of this case.

2. Law

In *Risher v. State*, 523 P.2d 421 (Alaska 1974) a two prong test for evaluating effective assistance of claims. First, defendants must show that their counsel's performance fell below the "range of competence displayed by one of ordinary training and skill in the criminal law". Second, defendants must show that this lack of competency had an adverse impact on the case that contributed to their convictions. Defendants have the burden of proving their counsel's lack of competency by clear and convincing evidence. This includes the burden to rebut the strong presumption that the attorney's actions stemmed from sound tactical decisions. *Id.* at 424.

Whether an attorney's performance constitutes ineffective assistance of counsel is a mixed question of fact and law. *State v. Laraby*, 842 P.2d 1275, 1280 (Alaska App. 1992). A trial court's denial of post conviction relief is reviewed to determine whether an

abuse of discretion occurred. *Brown v. State*, 803 P.2d 887, 888 (Alaska App. 1990). The reviewing court accepts the trial court's findings of fact unless they are clearly erroneous; the trial court's conclusions of law are reviewed de novo. *Jackson v. State*, 750 P.2d 821, 825 (Alaska App. 1988); *Arnold v. State*, 685 P.2d 1261, 1265-65 (Alaska App. 1984).

The labeling of "strategic" does not apply when the attorney fails to examine exculpatory evidence. The label of "trial strategy" does not automatically immunize an attorney's performance from Sixth Amendment challenges. Tactical decisions of trial counsel *only* "deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances". *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). The trial court's finding of fact that the refusal to re-test the DNA evidence for a more precise determination was strategic, without a hearing, was clearly erroneous as it Billingslea's decision was *contrary* to the facts known to Billingslea and unreasonable under the circumstances. First, there was objective evidence and witnesses that place Osborne away from K.G. and, second, Osborne stated he was not there. Third, Billingslea never consulted an independent DNA expert

Billingslea's failure to consult with an independent expert even after Osborne sought more information was a breach of her duty to independently investigate the case. Relying on *Strickland*, the state's expert, was insufficient investigation. It has been stated that when an attorney fails to examine potentially exculpatory evidence, the *Strickland* presumption that the

failure is sound trial strategy is surmounted. *See Jones v. Wood*, 114 F.3d 1002, 1011 (9th Cir. 1997). The presumption that counsel is effective cannot excuse a total failure to investigate and prepare a defense. *See Turner v. Duncan*, 158 F.3d 449, 456-7 (9th Cir. 1998).

Osborne recognizes there is appellate authority, both state and federally, that hold that a trial attorney's tactical decision not to have evidence independently tested does not amount an ineffective assistance of counsel. *Helton v. State of Arkansas*, 924 S.W. 2d 239, 246 (Ark. 1996); *State of New Jersey v. Halsey*, 748 A.2d 634, 635-7 (NJ 2000); *Sanders v. State of Kansas*, 995 P.2d 397, 400 (Ct. of Appeals 2000). However, these cases do not necessarily foreclose Osborne from having independent DNA testing. It should be noted that New Jersey now has a statute that allows a defendant to seek a new trial if he can now show that recently improved scientific methodology, not available at the time of trial, would have probably have changed the result. *Halsey* at 638.

In *Satcher v. Pruett*, 126 F.3d 561 (4th Cir. 1997), the defendant claimed ineffective assistance of counsel due to trial counsel's failure to have the evidence independently tested. A more restrictive testing (RFLP) was not used. The federal court noted that "[a]lthough independent DNA testing might have helped Satcher, it could have hurt him". *Id.* at 573. Introducing the evidence might have signaled implicit approval of DNA, thereby undermining the defense argument at trial that DNA testing was inherently unreliable. Therefore the failure to independent testing of the evidence was not constitutionally deficient. *Id.* at 573.

Osborne's case is easily distinguishable from *Satcher*. Osborne did not contest the findings of the PCR testing, he argued that it was inconclusive as to him. Specifically, that convicting him based on the fact that he was consistent with findings as was 16% of the African-American population was an inadequate basis to convict him. Further, unlike *Satcher*, Osborne wanted independent testing. [Exc. 095]

In 1992, the Missouri Supreme Court reversed a rape conviction due to trial counsel's failure to obtain requested blood tests and granted a new trial. The theory was that the tests would have shown that the source of semen found on the bed sheets could not have been the defendant's. *Moore v. Missouri*, 827 S.W. 2d 213 (Mo. 1992).

3. DNA Conclusion

Merely discussing the background of DNA testing with others (non-experts) at the time was insufficient investigation of the forensic evidence. Osborne's trial counsel should have consulted an independent expert. Billingslea's decision cannot be deemed strategic since she did not do an independent investigation with a DNA expert or have the evidence tested. Her decision not to test the evidence was not reasonable as K.G. said she was picked up at 9 p.m. and numerous witnesses (including a video tape) had Osborne with them when the alleged sexual assault occurred.

Billingslea's failure to do the additional testing prejudiced Osborne as it allowed prosecution to argue conclusive identity via the forensic evidence when K.G.'s identification was problematic due to lighting, stress and injury, poor eyesight, cross-racial identification. A non-matching DNA result would have

cleared Osborne since K.G. and the prosecution were both certain he was the condom wearing passenger.

The trial court should be reversed in the decision that Osborne had not established a *prima facia* case of ineffective assistance of counsel. This court should issue an order to have the biological evidence tested in order to establish the prejudice prong of *Risher*. In the alternative, it should be remanded for a full evidentiary hearing on the matter.

C. THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT ORDERING A HEARING WHETHER BILLINGSLEA WAS INEFFECTIVE AS TO DNA EVIDENCE.

1. Facts

As previously outlined, Billingsley stated in her December 11, 2001 affidavit that by her own admission this was her first DNA case. She confirmed that Osborne wanted another opinion. [Exc. 460] She was afraid of the results of the additional testing. However, she did not consult her own expert, she merely chatted with other attorneys and the State Crime Lab worker. [Exc. 375] In this instance, Osborne was denied access to experts, even after he raised the issue and contacted an expert in an attempt to vindicate himself.

Osborne, in his sworn affidavit, stated that prior to trial in 1993, Billingslea told him that OPA did not have the budget for an expert or is independent testing. [Exc. 095] That was when he sought out Mr. Roberts. [Exc. 096] This is a contested point and a hearing should have been held. Osborne stated he provided Ms. Billingslea with the letter from Mr. Roberts dated October 5, 1993. This is not contested between Osborne and Billingslea. As noted previ-

ously, Billingslea contests Osborne's statements. As such, a hearing should have been order on whether Billingslea was ineffective and to resolve the factual dispute between Osborne and his prior counsel. In Alaska, if there is a *prima facia* case established, then discovery commences and then there is an evidentiary hearing and formal resolution of factual disputes. Osborne contends that the trial court prematurely dismissed his PCR as there were factual issues still in dispute.

There are a number of factual disputes that needed to be litigated before the trial court: 1) Did Billingslea do an adequate investigation concerning DNA evidence?; 2) Did Billingslea make a reasonable decision not to do further testing DNA evidence against her client?; 3) Did Billingslea tell Osborne there was no money for testing or an expert?; 4) Did the failure to consult with an independent expert and testing violate Osborne's rights as outlined in *Ake* and its progeny? These issues should have had been properly vetted through an evidentiary hearing.

2. Law

i. Ineffective Assistance of Counsel.

Whether an attorney's performance constitutes ineffective assistance of counsel is a mixed question of fact and law. *State v. Laraby*, 842 P.2d 1275, 1280 (Alaska App. 1992). A trial court's denial of post conviction relief is reviewed to determine whether an abuse of discretion occurred. *Brown v. State*, 803 P.2d 887, 888 (Alaska App. 1990).

The claim of ineffective assistance of counsel is governed by the United States Supreme Court opinion *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* was adopted in *State v. Jones*, 759 P.2d

558 (Alaska App. 1988). *Strickland* was a death-penalty case in which there was an argument whether the trial counsel properly represented the defendant at sentencing. The court took the case to clarify the standards governing ineffective assistance of counsel claims. There are several touchstones that were developed in the opinion.

First, the U.S. Constitution guarantees a fair trial through the due process clause. A fair trial is one in which evidence subject to adversarial testing is presented to an impartial jury for resolution of issues. *Id.* at 684-5, 692-691. The right to counsel plays a crucial role in the adversarial system since access to counsel's skill and knowledge is necessary to accord defendants ample opportunity to meet the case of the prosecution to which they are entitled. *Id.* at 685. Counsel has the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Id.* at 688.

The mere fact that a person who happens to be a lawyer is present at the trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure the trial is fair. *Id.* at 685. The benchmark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.* at 686.

The Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The investigation need not be exhaustive. It must include an independent examination of the facts, circumstances, pleadings, and laws involved. The scope of the duty depends on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful. *Strickland* at 681.

Strickland sets forth a two-part test for determining whether the actions of counsel were ineffective. The defendant must show that the attorney's performance was deficient or unreasonable, and that the attorney's decisions had an adverse effect on the defense. *Id.* at 693. In making a determination of ineffectiveness, the court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or the jury. *Id.* at 696. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming guilt. *Id.* at 696.

In Alaska, if there is a *prima facia* case established, then discovery commences and then there is an evidentiary hearing and then formal resolution of disputed facts. *Parker v. State*, 779 P.2d 1245 (Alaska App. 1989).

ii. Right to independent expert and investigation

Osborne should have had the benefit of an expert look over the DNA materials before trial. This matter should have been litigated before trial court with witnesses. The leading case on this point is *Ake v.*

Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 1985).[4] In *Ake*, who was a defendant in a death penalty case, requested the appointment of a psychiatrist to assist on a sanity defense. The Supreme Court explained that due process requires access to the raw materials integral to the building of an effective defense. *Id.* at 77.

Subsequent courts, both state and federal, have determined that *Ake* applies to non-psychiatric experts. *See Rey v. State of Texas*, 897 S.W. 2d 333, n. 4 (Tex. Ct of Appeals, 1995); *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987) (cert denied, cite omitted); *Husske v. Virginia*, 252 Va. 203, 476 S.E. 2d 920 (VA 1996). [Defendant has a right to a DNA expert under *Ake*, but did not show the particularized need. No error also due to defendant's confession]; *People of the State of Michigan v. Leonard*, 224 Mich. App. 569, 569 N.W. 663 (Ct. of Appeals, 1997.) [Defendant has right to a DNA expert if there is particularized showing. New trial order vacated because the appellate court believed the trial attorney knew enough about DNA evidence from the cross-examination); *Polk v. State*, 612 So. 2d 381, 393-94 (Miss. 1992) [A defendant who is the subject of DNA testing must have access to an independent expert who can independently evaluate the DNA evidence against him.]; *Richardson v. State of Mississippi*, 767 So. 2d 195

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[4] The State of Alaska recognized *Ake* in *Shaw v. State of Alaska*, 861 P.2d 566, n. 6 (Alaska 1993). However it did not deal with the issue of experts, but addressed the protective role or the Constitution, noting: "The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern." *Id.* at 78, 105 S.Ct. at 1093.

(Miss. 2000) [Conviction reversed, among other grounds, for DNA re-testing even though the victim positively identified him and there was a confession]; *State of New Jersey v. Thomas*, 245 N.J. Superior 428, 586 A.2d 250 (NJ Sup. App. 1991) [DNA testing ordered even though two victims identified him. There is an extensive discussion on why DNA testing was necessary and why the defense attorney should have sought testing. The *Thomas* court held that a defendant must be relieved from an attorney's tactical decision that "cut morally into the substantive rights of the defendant"].

Law review articles also point out that defendants need the independent testing and access to experts. "*Genetics and Justice: an Indigent Defendant's Right to DNA Expert Assistance*" by John Devlin, 395 University of Chicago Legal Forum, 1998. The experts and testing are to ensure that the defendants receive a fair and accurate trial.

iii. Argument

Billingslea knew Osborne was with others on the night in question. She had the time stamped tape showing him at the arcade after K.G. claimed she was picked up. Osborne stated he was innocent and wanted the biological material re-tested. Thus, there were strong objective reasons for her to test (even if she did not believe her client) and have Osborne excluded as the source of the seminal fluid. In order for her to believe Osborne was lying about his innocence as to K.G., Billingslea would have to believe all the defense witnesses (both military and non-military) were conspiring to help Osborne by saying he was with them at 9:00 p.m. Further that the time stamped video from Space the Station arcade was wrong.

In this case the evidence of Osborne's guilt was not over-whelming, so the effect of her non-action was immense and highly prejudicial. The circumstantial evidence case against Osborne based on poor identification that was bolstered with inexact science that was hailed as conclusive by the prosecution.

Osborne contends that a minimally competent attorney would have had the DNA further tested under such a scenario or at least consulted an independent expert. Billingslea, by her own admission, consulted no expert except the State of Alaska's own criminalist. This was insufficient as Strickland would not point out the flaws and the problems in her own work. As a practical matter, any questions Billingslea posed to her would have been disclosed to the district attorney and not protected by the attorney work product privilege.

Billingslea abrogated Osborne's right to due process by not consulting with an independent expert on DNA in order to assure the validity of the DNA testing and by securing the independent and more exacting testing as requested by her client.

This court could order an evidentiary hearing. It should only do so if Osborne has not established a right to DNA testing through the prior arguments.

CONCLUSION

Osborne has the right to post conviction testing of the dna evidence. Identity of Osborne being the condom wearing passenger was a central issue at trial. Evidence was presented that demonstrated Osborne could not have been the passenger. The jury rejected this evidence but also rejected K.G.'s claim she had been shot. The requested testing would produce new,

non-cumulative evidence materially relevant to the Osborne's assertion of actual innocence.

Numerous states have passed legislation in recognition of the recent DNA exonerations. Osborne's issue is neither new or novel. Alaska has failed to do so even though national standards were being set-forth in 1999. State and federal courts have held that the interest in finality of a judgment is superceded by need to ensure only the guilty are imprisoned.

As to Osborne, the condom and pubic hairs seized at the crime scene must be made available to him for new and improved dna testing. At trial, the prosecution asserted that the condom was used by the passenger in the sexual assault of K.G. and a source of evidence to establish that Osborne's "identity" that he was the assailant of K.G. K.G.'s identification of Osborne was both problematic and unreliable His guilt should not be upheld when he was viewed precariously as "most likely" to being the assailant. This identification was bolstered by questionable hair and DNA evidence.

Osborne has always maintained his innocence and wanted the condom tested more precisely. This court can over turn the trial court and order DNA testing under two theories. First, as part of the discovery in the PCR. Counsel can not ascertain whether there is merit to Osborne's claim that Billingslea was ineffective in her assistance of counsel without the DNA testing. Second, the court can order the DNA testing under a due process theory.

No matter what the basis, Osborne has established the need and precedent for the trial court to order the release of the evidence for additional testing. This court should reverse the trial court's dismissal of the

post-conviction relief and order release of the evidence for testing.

DATED this 12 day of September, 2003, at Anchorage, Alaska.

KALAMARIDES & LAMBERT, INC.
Attorneys for Appellant

By: /s/ Randall S. Cavanaugh
Randall S. Cavanaugh
ABA #8812215

Filed JAN 07, 2004
United States District Court
District of Alaska

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

A03-0118 CV (RRB)

WILLIAM G. OSBORNE,
Plaintiff,

vs.

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ANCHORAGE ALASKA, *et al.*,
Defendants.

RECOMMENDATION REGARDING MOTIONS TO DISMISS BY ANCHORAGE POLICE DEPARTMENT AND POLICE CHIEF WALT MONEGAN; AND ANCHORAGE DISTRICT ATTORNEY'S OFFICE AND FORMER DISTRICT ATTORNEY SUSAN A. PARKES

(Docket Nos. 34 and 37)

The court has now before it two motions to dismiss the above entitled action on the grounds that the plaintiff's (William G. Osborne's) complaint under 42 U.S.C. § 1983 should be dismissed for failure to state a claim for relief upon which relief can be granted, and under the abstention doctrine set forth in *Younger v. Harris* 401 U.S. 37, 46-53 (1971). (Docket Nos. 34 and 37). The motions are completely overlapping and therefore are addressed together. Osborne file an opposition to both motions at docket No. 41. Reply briefs were filed at docket Nos. 53 and

54. For the reasons that follow the motions to dismiss should be granted.

BACKGROUND

Osborne was tried by jury and convicted in Alaska Superior Court of one count of kidnapping, two counts of first-degree sexual assault, and one count of first-degree assault. He was sentenced to an aggregate term of 26 years, and is presently incarcerated. His convictions were affirmed on direct appeal. Osborne next moved for post-conviction relief in a civil action in Alaska Superior Court. That relief was denied, and Osborne has appealed to the Alaska Court of Appeals. That appeal is pending. The issues [claims] presented for review on appeal are: (1) The trial erred as a matter of fact and law in denying counsel access to the [DNA] evidence during the PCR [post conviction relief review]; (2) The trial court erred in the fact finding that Billingslea's [defense counsel's] refusal to test the [DNA] evidence was strategic and therefore she was not ineffective; (3) The trial court erred as a mater of law in not ordering a hearing whether Billingslea [defense counsel] was ineffective as to DNA evidence.

In the instant § 1983 action Osborne claims:

(1) By refusing to release biological evidence for DNA testing the defendants denied Osborne access to evidence that could have exonerated him; thereby denying access to exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Due Process Clause of Fourteenth Amendment of the Constitution.

(2) By refusing to release biological evidence for DNA testing the defendants deprived Osborne of the opportunity to make a conclusive showing that he is

actually innocent of the crimes for which he is currently incarcerated, in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution.

(3) By refusing to release biological evidence for DNA testing, the defendants deprived Osborne of an opportunity to make a conclusive showing of actual innocence in violation of the Eighth Amendment to the Constitution.

(4) By refusing to permit Osborne access to biological evidence for DNA testing so that he could prove his innocence, the defendants deprived Osborne of a fair executive clemency proceeding where he can make a showing of actual innocence.

(5) By refusing to release [biological] evidence for DNA testing, the defendants deprived Osborne of his right to present evidence of innocence in State Court, Federal Court, or before the Alaska Parole Board in violation of the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the Constitution.

(6) By refusing to release biological evidence for DNA testing, the defendants arbitrarily denied Osborne of his right to meaningful access to state and federal court to establish his actual innocence in violation of *Ex Parte Hull*, 312 U.S. 546 (1941), *Christopher v. Harbury*, 536 U.S. 403 (2002), the Petition Clause of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

DISCUSSION

The defendants make their motions on two grounds. First, under the abstention doctrine of *Younger v. Harris* 401 U.S. 37, 46-53 (1971) the court

should not consider the merits of this case. Secondly, Osborne has failed to state a claim upon which relief can be granted because a § 1983 action cannot be used to attack the validity of a conviction or sentence when such an attack is properly brought in an action for writ of habeas corpus.

I

ABSTENTION DOCTRINE

In what is known in legal parlance as the "abstention doctrine", the Supreme Court instructs that there is a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Younger* 401 U.S. at 41. Younger involved a facial challenge to a criminal statute, but the abstention doctrine is not restricted to criminal cases. "The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 432 (1982). The importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature. *Id.* In the instant case, Osborne's pending state court habeas petition is a civil action springing from criminal proceedings. It is beyond cavil that petitions for writs of habeas corpus bear a close relationship to proceedings criminal in nature.

The policies underlying *Younger*—a notion of "comity" including "a proper respect for state functions—*Id.* at 431—are present in the instant case. Osborne has not shown extraordinary circumstances which would justify interference with pending state judicial proceedings. As penned by Chief Justice

Burger in *Middlesex Ethics Comm.*: "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Id.*

As Osborne posits, however, there is a component of the abstention doctrine which is not present in this case. Osborne's § 1983 action does not call for interference with his state court case. He does not seek to enjoin the state court proceedings. Parallel state and federal cases can proceed without violating *Younger* and its progeny. As the Ninth Circuit teaches in *Green v. City Of Tucson*, 255 F.3d 1086, 1097 (9th Cir. 2001):

> In short, as the Court has often repeated, the "mere potential for conflict in results of adjudications" *Colorado River*, 424 U.S. at 816, 96 S.Ct. 1236 ,is not the kind of "interference" that merits federal court abstention. Rather the possibility of a race to judgment is inherent in a system of dual sovereigns and, in the absence of "exceptional" circumstances, *id.* at 818, 96 S.Ct. 1236, that possibility alone is not insufficient to overcome the weighty interest in the federal courts exercising their jurisdiction over cases properly before them.

The defendants' murky response to *Green* is to the effect that deciding this case would not only possibly result in a mere conflict on a point of law, "but will also effectively truncate the state court criminal proceeding." The court cannot discern how such a truncation would occur, and finds *Green* controlling. The abstention doctrine is inapposite.

II

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN GRANTED

Under Fed. R. Civ. P. 12(b)(6) an action is dismissible if it fails to state a claim upon which relief can be granted. The defendants contend Osborne has failed to state a claim upon which relief can be granted because his § 1983 claims challenge the validity of his state court conviction and are therefore only cognizable in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) the Supreme Court instructs that when a state prisoner challenges the fact or duration of his imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from imprisonment, his sole federal remedy is a writ of habeas corpus. In *Heck v. Humphrey* 511 U.S. 477, 489-490 (1994) the court held that in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

The case *sub judice* presents neither a direct challenge to the fact nor duration of imprisonment, nor damages. Osborne seeks equitable relief by way of release of biological evidence which might exonerate him from the crimes for which he was convicted. Precedent relating to this new question of law reveals a split between Eleventh Circuit and the

Fourth and Fifth Circuits. The Eleventh Circuit held that a post conviction § 1983 action seeking access to evidence for the purpose of DNA testing does not "necessarily imply" the invalidity of a conviction as contemplated in *Heck* 512 U.S. at 487, and was therefore not the functional equivalent of a habeas corpus petition. *Bradley v. Pryor*, 305 F.3d 1287, 1291-1292 (11th Cir. 2002). The Eleventh Circuit reasoned that if the plaintiff were successful in his lawsuit, "his conviction and sentence would not be called into question, since the only thing he will have secured is access to evidence." *Id.* at 1292.

The defendants urge the court to reject the Eleventh Circuit's rationale in favor of the holdings of the Fourth and Fifth Circuits. In *Harvey v. Horan*, 278 F.3d 370, 374-376 (4th Cir. 2002) the Fourth Circuit held that a plaintiff's seeking to subject biological evidence to DNA testing failed to state a claim under § 1983. The Fourth Circuit reasoned:

> While finality is not the sole value in the criminal justice system, neither is it subject to the kind of blunt abrogation that would occur with the recognition of a due process entitlement to post-conviction access to DNA evidence.
>
> Furthermore, *Heck* teaches that § 1983 does not exist to provide an open-ended assault on the finality of criminal judgments. *See Heck*, 512 U.S. at 486-87, 114 S.Ct. 2364. Instead, § 1983 exists for the more limited purpose of redressing violations of the Constitution and federal statutes. Harvey has made no argument that his conviction violates the Constitution or any federal law. In fact, at oral argument Harvey conceded that he received due process under the law and under the science in existence when he

> was convicted in 1990. To confer upon Harvey a wide ranging constitutional right in the absence of any argument that his underlying conviction violated the Constitution or a federal statute is simply beyond judicial competence.

Id. at 376. *Harvey* also concluded that the plaintiff's claim, if successful, would set the stage for attack on his confinement; thereby transforming the action into a petition for writ of habeas corpus. *Id.* at 378. In *Kutzner v. Montgomery County*, 303 F.3d at 339, 340-341 (5th Cir. 2002) the Fifth Circuit held that no cause of action exists under § 1983 where a plaintiff sought to compel state officials to produce biological evidence for DNA testing on a theory that, by refusing to release such evidence, officials violated his constitutional rights by preventing him access to evidence that might exclude him as the perpetrator. Adopting the reasoning of *Harvey*, and reiterating the Fifth Circuit's own position, the court in *Kutzner* reasoned:

> *Harvey*, as stated, analyzed a claim for DNA testing much like this one and drew the obvious conclusion that the proposed remedy is sought "to set the stage for a future attack on [the prisoner's] confinement"—effectively transforming the claim into a petition for writ of habeas corpus. *Harvey*, 278 F.3d at 378. Not only is *Harvey* strongly persuasive, but this Court, too, has recently reiterated that claims seeking to attack the fact of duration of confinement, as well as claims which are "so intertwined" with attacks on confinement that their success would "necessarily imply" revocation or modification of confinement, must be brought as habeas corpus petitions and under § 1983. *Martinez v. Texas*

> *Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir. 2002). Under *Martinez*, a prisoner's request for DNA testing of evidence relevant to his prior conviction is "so intertwined" with the merits of the conviction as to require habeas corpus treatment.

Id. at 341

Osborne urges the court to reject *Harvey* and *Kutzner* arguing they do not support dismissal under *Heck*. Rather, he continues, the court in *Bradley* should be followed. But the court is not persuaded. Rather, the court finds the reasoning of the Fourth and Fifth Circuit's compelling because it is inescapable that the only purpose of accessing the biological evidence sought by Osborne is to "set the stage" to attack his underlying convictions. Such an attack is properly part of a petition for habeas corpus and this court is not in a position to expand a prisoners rights as Osborne would have the court do here. Providing for a special avenue of relief relating to access to biological evidence for DNA evidence is within Congress' ken, not the court's. (See discussion of legislative action in *Harvey* 278 F.3d at 376-377.). Until such a specific avenue of relief is provided for, plaintiffs like Osborne must proceed through a writ of habeas corpus.

Finally, Osborne analogizes his case with the Ninth Circuit holding of *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997). There, prisoners brought separate § 1983 actions against prison officials and administrators of Hawaii's sex offender treatment program alleging that labeling them as sex offenders and compelling them to admit to guilt to sexual offenses violated their constitutional rights. The Ninth Circuit rejected the defendants contention that

habeas corpus, not § 1983, was the appropriate avenue for relief. In doing so the Ninth Circuit reasoned that success on the merits would not undermine the plaintiffs' convictions, but would only get them "a ticket to get in the door of the parole board thus only making *them* eligible for parole consideration according to the terms of their sentences." *Id.* at 824. Osborne's analogy to *Neal* fails. *Neal* related to rights of confined persons to seek parole. It did not involve an indirevt attack on the fact or duration [sentence] of his confinement. Osborne seeks to "set the stage" to attack the fact of his confinement by proving that he was not the perpetrator of the crimes of which he was convicted.

For the foregoing reasons it is hereby recommended that the defendants' motions to dismiss at docket Nos. 34 and 37 be GRANTED.

DATED this 7th day of January, 2004, at Anchorage, Alaska.

/s/ John D. Roberts
JOHN D. ROBERTS
United States Magistrate Judge

Pursuant to Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than the close of business on January 21, 2004, to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. *McCall v. Andrus*, 628 F.2d 1185, 1187-1189 (9th Cir.), *cert. denied*, 450 U.S. 996 (1981). The Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a

party's objection to a magistrate judge's recommendation *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000). Objections and responses shall not exceed five (5) pages in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before the close of business on January 30, 2004. The parties shall otherwise comply with provisions of Federal Rule Of Civil Procedure 72(b).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R. App.P. 4(a)(1) should not be filed until entry of the district court's judgment. *See Hilliard v. Kincheloe*, 796 F.2d 308 (9th Cir. 1986).

Filed JAN 28, 2004
United States District Court
District of Alaska

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

A03-0118 CV (RRB)

WILLIAM G. OSBORNE,
Plaintiff,

vs.

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ANCHORAGE ALASKA, *et al.*,
Defendants.

FINAL RECOMMENDATION REGARDING MOTIONS TO DISMISS BY ANCHORAGE POLICE DEPARTMENT AND POLICE CHIEF WALT MONEGAN; AND ANCHORAGE DISTRICT ATTORNEY'S OFFICE AND FORMER DISTRICT ATTORNEY SUSAN A. PARKES

(Docket Nos. 34 and 37)

The Magistrate Judge has reviewed the objections of the Anchorage district Attorney's office and former district attorney Susan A. Parkes, Mr. Osborne's objections, and the responses of the Anchorage District Attorney's Office and Susan A. Parkes to Osborne's objections, to the initial recommendation that the two motions to dismiss the above entitled action be granted because Osborne's complaint under 42 U.S.C. § 1983 fails to state a claim for relief upon which relief can be granted. (Docket Nos. 55, 56, 58 and 60). Nothing in the objections or responses would

cause the Magistrate Judge to modify his initial recommendation. A few comments, however, are in order.

First, the objections of the Anchorage District Attorney's Office and Susan A. Parkes relate only to that portion of the recommendation concluding that the *Younger* abstention doctrine is not applicable to this case. These objections reargue the issue. The Magistrate Judge remains unpersuaded that the abstention doctrine is applicable.

Secondly, Osborne argues that there is no Alaska statute addressing post-conviction DNA testing or official policy on the subject. The Anchorage District Attorney's Office and Susan A. Parkes are correct that this does not necessarily reflect an unwillingness to allow post-conviction DNA testing. Rather, it only reflects the absence of a statute and the absence of a policy. At the end of the day, this is a matter for the Alaska Court's to first address in the appeal Osborne presently has pending before them. In all other respects the objections and responses reargue issues fully addressed in the initial recommendation.

CONCLUSION

For the foregoing reasons the Magistrate Judge hereby declines to modify his recommendation that the defendants' motions to dismiss at docket Nos. 34 and 37 be GRANTED because Osborne's complaint under 42 U.S.C. § 1983 fails to state a claim for relief upon which relief can be granted. Finally, Osborne has requested oral argument on the instant motion. (Docket No. 57; opposition at docket No. 59). Said motion is untimely, and oral argument is not necessary to deciding the questions of law presented by the motions. Therefore, Osborne's request for oral argument at docket No. 57 is hereby DENIED.

DATED this 27th day of January, 2004, at Anchorage, Alaska.

/s/ John D. Roberts
JOHN D. ROBERTS
United States Magistrate Judge

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-97-006336 CI

WILLIAM G. OSBORNE,
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

FINDINGS ON REMAND

This case is before this court on remand from the Court of Appeals. *Osborne v. State*, 110 P.3d 986 (Alaska App. 2005). Specifically, this court is to determine whether Mr. Osborne has a due process right pursuant to the Alaska Constitution to have more discriminating DNA testing performed on physical evidence from the crime scene.[5] Mr. Osborne has asserted that additional testing could demonstrate that he was factually innocent of the crimes for which he was convicted.

The Court of Appeals has remanded this case to the trial court to determine whether Mr. Osborne can meet a three-part test that it articulated in its

---

[5] In its decision, the Court of Appeals stated that "it appears . . . that Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence." However, Mr. Osborne has a case presently pending before the United States District Court with respect to that issue. *See Osborne v. District Attorney's Office*, 423 F. 3d 1050 (9th Cir. 2005).

decision. Pursuant to the Court of Appeals decision, in order to obtain post-conviction DNA testing, Mr. Osborne must show, at a minimum, "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." *Osborne v. State*, 110 P. 3d at 995. If this court finds that Mr. Osborne meets this test, then the Court of Appeals specified additional legal determinations that this court is to make.

This court has now reviewed the extensive briefing of the parties with respect to these three points, together with the trial transcript. Based on that review, this court finds as follows:

1. *Did the conviction rest primarily on eyewitness identification evidence?*

At trial, K.G. identified Mr. Osborne as one of the perpetrators of the crime. She had also identified him in a line-up. Her trial testimony was that she had no doubt that Mr. Osborne was the passenger in the vehicle at the time of the crime. (Tr. 446).

As noted by the State, in the prosecutor's closing argument, she first argued that the testimony of K.G., the victim, alone was sufficient to convict. But then she asked the jury "to join me in an exercise of caution in which we assume K.G. never came in here, she never testified, and you never heard from her, and I will show you that the evidence in this case warrants a conviction of Osborne . . . even if you never met K.G." (Tr. 1898).

As the prosecutor then demonstrated, there was substantial physical evidence to place Mr. Osborne's co-defendant, Dexter Jackson, at the scene of the crime. A non-exclusive list of the physical evidence at trial against Mr. Jackson included the following evidence: (1) imprints of tires matching Mr. Jackson's car were found at the scene of the crime (Tr. 142-3); (2) the victim's readily identifiable pocketknife was found on Mr. Jackson's person when he was arrested (Tr. 703-707, 714-19, 733-36), (3) a fiber similar to the carpeting of Mr. Jackson's car was found on the victim's sweater (Tr. 872-78, 884), (4) a bottle of perfume that the victim had with her at the time of the crime was found in Mr. Jackson's car (Tr. 442-43), (5) blood found in Mr. Jackson's car was tested and matched the victim's DNA (Tr. 1507-1510), (6) an expended round was found at the scene that was later determined to have come from Mr. Jackson's gun (Tr. 1533, 1546-7), and (7) that same gun was located in the glove box of Mr. Jackson's vehicle when he was arrested by military police. (Tr. 703-707, 714-19, 733-36).

Although there was less evidence to place Mr. Osborne at the scene of the crime, the following evidence, in addition to K.G.'s identification of Mr. Osborne, was presented at trial:

- Mr. Osborne called Mr. Jackson twice from the Space Station earlier in the evening of the crime. (Tr. 1275-6, 1288).
- Mr. Osborne was seen entering a vehicle driven by Mr. Jackson near the Space Station at approximately 9:30 p.m. on the evening of the crime. (Tr. 1219, 1284).

- Mr. Osborne was seen later that same evening with Mr. Jackson, and some of the witnesses who saw Mr. Osborne at that time noticed blood on his clothing. (Tr. 1088, 1113, 1177).
- K.G. told the woman who picked her up immediately after the incident that the assailants were "two black guys with military kind of haircuts," which was consistent with Mr. Osborne's physical characteristics. (Tr. 91).
- A tool handle was found in Mr. Osborne's room, similar to the tool handle that was found at the crime scene which K.G. described was used to hit her. (Tr. 1293).
- Space Station tickets were found in Mr. Jackson's vehicle. (Tr. 1288).

There was also some scientific evidence that was presented to the jury. A state criminalist testified that a pubic hair found on K.G.'s sweater was dissimilar to Mr. Jackson's hair, but that it could have come from Mr. Osborne. But in cross-examination, this witness acknowledged that the similarity "could be a coincidence." (Tr. 888.) The scientific testing of hair at that time was evidently limited to microscopic examination, not DNA testing. Another hair found on K.G.'s sweater was dissimilar to both Mr. Osborne and Mr. Jackson. (Tr. 1113). There was also a condom wrapper found at the crime scene near the shell casing. (Tr. 916). K.G. testified that the condom wrapper was exactly like the kind of condom that she had with her that evening. (Tr. 442). She also testified that the passenger in the car took her condom and put it on before he had sex with her at the crime scene. (Tr. 526).

A used condom was found at the scene of the crime. (Tr. 915). A crime lab worker tested its contents, and determined that the DQ alpha type of the sperm in the condom was similar to that of Mr. Osborne, but not Mr. Jackson. The state's expert testified that between 14.7 and 16 percent of the African American population would have this same genotype. (Tr. 1504). She indicated that she considered sending out the sample for more discriminating testing, which was then available through the FBI. However, at least at that time, more discriminating testing required a better quality sample than was provided in the condom. (Tr. 1515). As a result, she did not recommend that the sperm from the condom be sent to the FBI for more discriminating tests "because I felt that the sample was degraded." (*Id.*). A pubic hair on the condom was found to be similar to Mr. Osborne's hair, but, like the other hair, the criminalist testified that the hair, while similar, was not necessarily from Mr. Osborne. (Tr. 883).

Upon consideration of all of this evidence, the court finds that Mr. Osborne has failed to make the requisite showing that his "conviction rested primarily on eyewitness identification evidence." Although the actual basis for the jury's determination is unknown, the State presented considerably more evidence at trial in addition to K.G.'s identification of Mr. Osborne in support of his conviction. Two separate groups of individuals placed Mr. Osborne with Mr. Jackson on the night of the crimes. The first group had Mr. Osborne getting into Mr. Jackson's vehicle in the area of Spenard where K.G. was picked up. Videotape and phone records from the Space Station supported Mr. Osborne's presence there. A second group of individuals saw Mr. Jackson and Mr. Osborne together later that same night after the

crimes were to have been committed. Some of these individuals reported that Mr. Osborne had blood on him.

It is also significant that the prosecution framed its closing argument precisely around the breadth of the evidence in this case. Having gone over K.G.'s account of the crime, the prosecution then invited the jury to factor out K.G.'s identification of Osborne and evaluate the other evidence independently. Thus, while K.G.'s testimony was highly incriminating for Osborne, the jury was explicitly counseled that it was not obliged to rely primarily on that testimony. In sum, this court finds that Mr. Osborne's conviction did not rest primarily upon eyewitness identification evidence.

2. *Was there a demonstrable doubt concerning the defendant's identification as the perpetrator?*

At trial, Mr. Osborne's primary defense was that he had been misidentified. And there were some problems with K.G.'s identification that were presented to the jury. The evidence established that K.G.'s uncorrected vision was somewhere between 20/300 and 20/400, and that she was not wearing glasses on the evening of the crime. (Tr. 1725). K.G. had identified the passenger as without any facial hair, while Mr. Osborne had a mustache. (Tr. 273). And K.G. had identified the passenger as weighing 180 to 190 pounds and between 25 to 30 years old, while Mr. Osborne was 20 years old and weighed 155 pounds. (Tr. 1408). Mr. Osborne also argues that eyewitness identifications are generally suspect, especially when a person of one race is asked to identify a person from another race.

K.G. testified at trial that she had no doubt that Mr. Osborne was the passenger in the vehicle: "When someone tries to kill you, when they come that close, you will not forget their face." (Tr. 446). If K.G.'s identification of Mr. Osborne were to be considered in isolation, without consideration of all of the other evidence that the state presented to support Mr. Osborne's conviction, then there would be demonstrable doubt concerning Mr. Osborne's identification as the perpetrator. But, as this court has found above, Mr. Osborne's conviction did not rest primarily upon K.G.'s identification of him. And when K.G.'s identification of Mr. Osborne is considered in conjunction with all of the other evidence submitted by the State at the trial, no such demonstrable doubt as to Mr. Osborne's identification has been established.

3. Would scientific testing likely be conclusive on this issue?

Mr. Osborne asserts that if the biological evidence in this case could be retested, it could conclusively establish that Mr. Osborne did not commit the crimes. One possibility of such testing is that the semen, which the criminalist found compromised and degraded in 1993, is still not of a quality to produce any definitive result, even with improved testing procedures. *See* Pet. Brief on Remand at 11.[6] Obviously, such scientific testing would not be conclusive at all in this circumstance.[7]

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[6] There, Mr. Osborne asserts, "Even if the fluid from the condom is degraded, Osborne can now have the hair found tested to show he was not the source of the pubic hair on either the sweater *or* the condom."

[7] By order dated August 20, 2002, this court ordered that the State cannot destroy any evidence in this case without court order.

It is also possible that the scientific testing would definitively establish that the sperm in the condom was from Mr. Osborne. This would be conclusive as to his presence at the crime scene.

Or it is possible that the semen sample is too degraded to be tested, but the hair that was found on either the sweater or the condom could be tested. If the hair on the condom was identified as from Mr. Osborne, that would be conclusive as to his presence at the crime scene.

Another possibility, and the one which Mr. Osborne is hoping to establish, is that the testing would definitively establish that the DNA in the semen or the hairs did not belong to Mr. Osborne. In this court's view, even if testing results as to the hair on the sweater demonstrated that the hair did not belong to Mr. Osborne, it would not be conclusive, particularly given K.G.'s work as a prostitute.

As to the pubic hair on the condom or the semen, a finding that these were not from Mr. Osborne presents a much closer question as to conclusiveness, particularly given K.G.'s testimony at trial about the condom. However, as the State notes, the condom and hair were not found at the crime scene until over 24 hours after the assault. (Tr. 106). Even assuming that the DNA of either the pubic hair or the semen was tested and found not be Mr. Osborne's, the State asserts that it would not explain away or defeat the considerable other remaining evidence that was introduced at trial which underlay the basis of the jury's conviction. Mr. Osborne argues that the State, in making this argument, is impermissibly changing its position by arguing that the State's own evidence that it presented at trial may be unreliable and that the State should not be permitted to disavow this

evidence on which the conviction was based. But the State has not argued that the DNA evidence would not support a conviction; it has instead argued that it did not and need not rely exclusively on that evidence. Given the extensive other evidence which linked Mr. Osborne to these crimes as summarized above, this court agrees with the State that such evidence, if obtained, would not be conclusively exculpatory. *Cf. Sewell v. State*, 592 N.E. 2d 705 (Ind. 1992); *Jenner v. Dooley*, 590 N.W. 2d 463 (S. Dak. 1999).

Finally, while the first two inquiries under the three-part test that the Court of Appeals has adopted are retrospective in nature, inquiry into the conclusiveness of any testing would appear to be prospective. It is thus relevant to this court that, in 2004, Mr. Osborne admitted in detail to committing this crime in an Application for Discretionary Parole. Fayette Aff. (Sept. 6, 2005), Ex 1. In that application, dated April 8, 2004, Mr. Osborne clearly acknowledged that he had sexually and physically assaulted K.G. Directly above his signature on the application is an acknowledgement that he "must state the exact and complete truth in this written application as well as at my parole hearing." *Id.*[8]

For the foregoing reasons, this court finds that scientific testing is not likely to be conclusive on the

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[8] Mr. Osborne recently submitted an affidavit with this court in January 2006. There, he stated that, "It is common knowledge that if an inmate does not make a confession to the crime he's convicted of, the parole board more than likely will not grant him discretionary parole." Nowhere in the recent affidavit does he indicate that his detailed admission to the crime that he made to the parole board in 2004 was false.

issue of Mr. Osborne's identification as one of the perpetrators of this crime.

Conclusion

Based on the above analysis, this court finds that Mr. Osborne has failed to meet any component of the three-part test set forth by the Court of Appeals. Accordingly, this court does not reach the additional legal questions that were conditionally posed to this court by the Court of Appeals in its decision.

DATED this 8th day of May, 2006.

/s/ Sharon Gleason
SHARON GLEASON
Judge of the Superior Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

William G. Osborne, Plaintiff	)	Case No. 3:03-cv-00118-RRB
v.	)	
DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ANCHORAGE, ALASKA; SUSAN A. PARKES DISTRICT ATTORNEY, in her official capacity; ANCHORAGE POLICE DEPT., ANCHORAGE, ALASKA; WALT MONEGAN, ANCHORAGE POLICE DEPT. CHIEF OF POLICE, Defendants.	)	

NOTICE OF FILING WILLIAM OSBORNE'S AFFIDAVIT FILED IN SUPERIOR COURT

COMES NOW the Plaintiff, William Osborne, by and through his attorneys, Randall S. Cavanaugh of KALAMARIDES & LAMBERT, Peter Neufield and David Menschel of the INNOCENCE PROJECT, and hereby files Mr. Osborne's Affidavit that was originally filed in Superior Court under Case No. 3AN-S97-0636 CI.

DATED this 7th day of June, 2006, at Anchorage, Alaska.

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IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT ANCHORAGE

WILLIAM OSBORNE,	)	
Petitioner,	)	Case No. 3AN-S97-0636 CI
v	)	T/V 3AN-93-2339 CR
STATE OF ALASKA,	)	
Respondent.	)	

NOTICE OF FILING

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW the Petitioner, William Osborne, by and through his counsel, Randall S. Cavanaugh of KALAMARIDES & LAMBERT, and hereby files a copy of Mr. Osborne's affidavit.

DATED this 18th day of January, 2006, at Anchorage, Alaska.

KALAMARIDES & LAMBERT
Attorneys for Defendant

By: /s/ Randall S. Cavanaugh
Randall S. Cavanaugh
ABA #8812215

[Certificate of Service omitted in printing]

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA THRID JUDICIAL DISTRICT
AT ANCHORAGE

WILLIAM OSBORNE,	)	
Petitioner,	)	Case No. 3AN-S97-0636 CI
v.	)	T/V 3AN-93-2339 CR
STATE OF ALASKA,	)	
Respondent.	)	

AFFIDAVIT OF WILLIAM OSBORNE

State of Alaska	)	
	)	ss.
Third Judicial District	)	

William Osborne, being first duly sworn upon oath, deposes and states:

1. I am the defendant in the above-captioned matter.

2. I have always maintained my innocence. I told my attorney I never did the crime I was charged with, specifically sexually assaulting and kidnapping K.G.

3. I asked my trial attorney, Sidney Billingslea, to have the condom material tested futher. She denied my request. I even sought outside help on the issue.

4. Mr.Cavanaugh has tried for years to obtain re-testing on the condom. The State of Alaska has refused to allow the testing. I have spent the majority of my sentence in solitary confinement.

5. I was even shipped to Florence, Arizona. While there, I was assaulted by a gaurd. The assault resulted in a four (4) inch scar on the back of my head in 1999. This is a matter of public record in Florence, Arizona.

6. I was shipped back to Alaska and have spent the majority of my sentence in solitary confinement at Spring Creek Correctional facility.

7. My facility parole officer gave me a parole package when I became eligible for discretionary parole. It is common knowledge amongst inmates that if an inmate does not make a confession to the crimes he's convicted of. The parole board more than likely will not grant him discretionary parole. It is also common knowlegde if an inmate has an attorney present at the parole hearing. That the inmate is viewed as being defensive and not accepting responsibility for his crime. I was not represented by counsel at my parole hearing.

8. My written and oral statements to the parole board was a reiteration of the information presented in numerous documents that are a matter of public record, and for which I was convicted and sentenced to serve 21 years in prison for.

9. I have no doubt whatsoever that re-testing of the condom will prove once and for all time either my guilt or innocence.

10. My life behind bars has been hellish. I said and wrote what I did at my parole hearing with the hope that the parole board might view me favorably and unbiasedly.

11. This motion is brought in good faith and not to harrass or delay this matter.

FUTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ William Osborne
William Osborne

SUBSCRIBED AND SWORN to before me on this 12 day of January 2006, at Seward, Alaska.

[SEAL]

Print Name: [Illegible]
Notary Public in and for Alaska.
My Commission Expires: 10/27/07

PETITIONER'S BRIEF

114

(5)

No. 08-6

Supreme Court, U.S.
FILED
DEC 24 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

William Osborne was charged with kidnapping, sexual assault, and physical assault. He had the assistance of a competent lawyer who made a reasonable strategic decision to forgo independent DNA testing of the state's biological evidence. He was convicted after an error-free trial. Now, years later, Osborne has filed an action under 42 U.S.C. § 1983, seeking access again to the biological evidence for purposes of new DNA testing. The questions presented are:

1. May Osborne use § 1983 as a discovery device for obtaining postconviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material?

2. Does Osborne have a right under the Fourteenth Amendment's Due Process Clause to obtain postconviction access to the state's biological evidence when the claim he intends to assert – a freestanding claim of innocence – is not legally cognizable?

PARTIES TO THE PROCEEDING

Petitioner District Attorney's Office[1] is part of the Alaska Department of Law; petitioner Adrienne Bachman (successor to Susan Parkes) is the Anchorage District Attorney. (This brief refers to the petitioners collectively as the "State.") The petitioners were defendants in the District Court, appellees the first time this case was before the United States Court of Appeals for the Ninth Circuit and appellants the second time. Respondent William Osborne was the plaintiff in the District Court and appellant and appellee, respectively, in the two cases before the Ninth Circuit. (In the District Court, Osborne also named as defendants the Anchorage Police Department and its chief, who have since been dismissed from the case. Pet. App. 12a.)

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[1] There is no district attorney's office for the entire Third Judicial District of Alaska. The office sued by Osborne actually has jurisdiction only over the Municipality of Anchorage and some isolated rural areas outside Anchorage.

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IN THE

Supreme Court of the United States

No. 08-6

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the United States Court of Appeals are reported at 521 F.3d 1118 and 423 F.3d 1050 and reprinted in the appendix to the petition for certiorari ("Pet. App.") at pages 1a-45a and 51a-62a, respectively. The district court's order is reported at 445 F. Supp.2d 1079 and reprinted at Pet. App. 46a-50a. The opinions of the Alaska Court of Appeals in Osborne's postconviction relief case are reported at 163 P.3d 973 and 110 P.3d 986 and reprinted at Pet. App. 63a-90a and 91a-112a, respectively. The opinion of the Alaska Court of Appeals in Osborne's

direct appeal is unpublished and reprinted at Pet. App. 113a-130a.

JURISDICTION

The United States Court of Appeals issued its decision on April 2, 2008. The petition for certiorari was filed on June 27, 2008, and granted on November 3, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."

The pertinent provisions of 28 U.S.C. § 2254, 42 U.S.C. § 1983, the Federal Rules of Civil Procedure, the Rules Governing Section 2254 Cases, and the Alaska Constitution and Alaska Statutes are set forth in the appendix to this brief.

STATEMENT

This case arises out of a kidnapping, rape, and brutal assault that occurred in Alaska in 1993. Osborne was convicted of those crimes based, in part, on DNA testing of biological evidence. After Osborne's conviction was affirmed on direct appeal, he initiated state postconviction proceedings, claiming that his defense lawyer had provided ineffective assistance by failing to seek a more discriminating form of DNA testing than that used by the state. He also requested permission to retest the evidence so that he could demonstrate his lawyer's mistake and establish its prejudicial effect. When that request

was denied, he asserted a due-process right under the state and federal constitutions to conduct such testing to demonstrate his innocence.

Those claims were rejected after proceedings that spanned eleven years (1997-2008) and generated two opinions of the Alaska Court of Appeals. In denying postconviction relief, the Alaska courts concluded that no federal due-process right to postconviction DNA testing exists, but such testing is potentially available under Alaska's Constitution and statutes. The courts eventually determined that Osborne could not satisfy the requirements that would entitle him to postconviction testing.

Rather than exhaust the state postconviction proceedings and then renew his claims in federal court by filing a habeas petition, Osborne filed a federal lawsuit under 42 U.S.C. § 1983. The § 1983 action was filed in 2003, after the state trial court had denied Osborne's postconviction-relief application but while his first appeal in that matter was pending. In his § 1983 action, Osborne asserted a federal constitutional right to obtain the biological evidence and subject it to new DNA testing. Osborne's § 1983 case involved two trips to the Ninth Circuit Court of Appeals, which ruled that (1) Osborne could use § 1983 essentially as a discovery device to obtain postconviction access to the state's biological evidence and (2) the Due Process Clause of the United States Constitution granted Osborne a right to obtain postconviction access to the state's biological evidence.

The attack on K.G. On March 22, 1993, Osborne and his friend, Dexter Jackson, solicited K.G. to perform fellatio in exchange for $100. Pet. App. 113a. They took her, in Jackson's car, to a secluded site near Anchorage International Airport, robbed her

at gunpoint, ordered her to strip, and then raped her, forcing her to perform fellatio on Jackson while Osborne penetrated her vagina with his finger and penis, using a blue condom taken from K.G. *Id.* at 114a. When they had finished raping her, Osborne ordered K.G. out of the car and told her to lie facedown in the snow. *Id.* When K.G. refused and pleaded for her life, Jackson struck her on the head with the gun, and Osborne choked her. *Id.* In mortal fear, K.G. defecated inside the car; Osborne rubbed excrement on her face and clothing. *Id.*

K.G. fled a short distance before the men caught her and began to beat her on the head and chest with a wooden stick, similar to an axe handle. Pet. App. 114a. When she tried to run away, Osborne struck her on her knees, telling her to "go down, bitch, go down." *Id.* The men continued to beat and kick K.G. until she fell to the ground. *Id.* at 115a. Osborne allowed her to stand up but then hit her in the head with the axe handle. *Id.* Finally, K.G. curled into a fetal position and played dead. *Id.* She heard a gun discharge and felt a bullet graze her head. *Id.* Based on her view of the men's feet and pants, K.G. believed it was Osborne who had fired the shot at her head. *Id.* After firing the shot, the men buried K.G. in the snow, believing she was dead or dying, and left. *Id.*

When K.G. was certain that the men had left, she gathered herself and started walking toward town. Pet. App. 115a. She flagged down a passing vehicle and told the occupants what had just happened to her, providing a description of the men and their car. *Id.* She insisted on being taken home. *Id.*

The police investigation. The next day, a neighbor of one of the persons who had taken K.G. home

reported the attack to the police. Pet. App. 115a. K.G. was initially uncooperative but eventually told the police what had happened. *Id.* She gave them the clothes she had been wearing, which had remnants of feces and tested presumptively for the presence of semen. *Id.* at 115a-16a. K.G. also submitted to a physical examination. *Id.*

Six days after the attack, the police stopped Jackson's car, which matched the description K.G. had provided. Pet. App. 116a. The police found a .380-caliber semi-automatic pistol and a box of ammunition in the car. *Id.* In Jackson's pocket was K.G.'s Swiss Army knife, which Jackson and Osborne had taken from her. *Id.* Jackson was arrested, confessed, and implicated Osborne.[1] *Id.* at 95a, 98a.

The police seized Jackson's car. Pet. App. 115a. DQ-alpha DNA testing of a blood spot on the door of Jackson's car matched K.G.'s profile.[2] *Id.* at 116a. Fibers matching the carpeting in the car were found on K.G.'s clothing. *Id.*

The police also canvassed the crime scene, where they found "an area of disturbed and bloody snow," two pairs of K.G.'s bloody pants, a used blue condom, and an expended round of .380 ammunition. Pet. App. 117a. Ballistics tests established that the round

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[1] Because Osborne and Jackson were tried jointly, Jackson's statements implicating Osborne were inadmissible against Osborne.

[2] The DQ-alpha method is a polymerase-chain-reaction-based (PCR) method of testing nuclear DNA. U.S. Dep't of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 27 (1999). The general match probability using DQ-alpha "is about 0.05." U.S. Dep't of Justice, *The Future of Forensic DNA Testing* 17 (2000).

had come from Jackson's pistol. *Id.* The tire tracks at the scene matched the tires on Jackson's car. *Id.* The police found an axe handle 114 feet from the crime scene. *Id.* The handle was similar to those Osborne used in his work and also similar to an axe handle found in Osborne's room. *Id.*

Fluid inside the blue condom was submitted for DQ-alpha DNA testing. Pet. App. 117a. Sperm in the fluid matched Osborne's DQ-alpha type, which is shared by 14.7 to 16 percent of African-American males. *Id.* at 68a, 117a. This testing excluded Jackson and James Hunter, Jackson's passenger when his car was stopped. *Id.* at 5a. Microscopic examination revealed that pubic hairs found on the condom and on K.G.'s sweater had the same characteristics as Osborne's pubic hair. *Id.* at 117a.

Witnesses had seen Osborne getting into Jackson's car shortly before the attack against K.G. Pet. App. 76a. Other witnesses saw Osborne and Jackson together shortly after the attack and said that Osborne had blood on his clothing. *Id.*

Finally, K.G. identified Osborne and Jackson from photographic lineups, and she identified Osborne again at trial. Pet. App. 76a, 95a.

Osborne's trial, conviction, and direct appeal. Osborne was convicted, after a jury trial in Alaska Superior Court, of kidnapping, first-degree sexual assault, and first-degree assault. Pet. App. 117a. He was given a composite sentence of 26 years' imprisonment with 5 years suspended. *Id.* at 117a-18a. On direct appeal, the Alaska Court of Appeals affirmed Osborne's convictions and sentence. *Id.* at 118a. Among other arguments, the Alaska Court of Appeals rejected Osborne's claim that insufficient

evidence supported K.G.'s identification of him as one of the two men who kidnapped, severely beat, and sexually assaulted her. *Id.* at 128a.[3]

Osborne's state postconviction-relief application. In 1997, Osborne filed an application for postconviction relief in state court, claiming that his defense lawyer had provided ineffective assistance by failing to seek a more discriminating form of DNA testing of the condom and pubic hairs. Pet. App. 97a. He asked to retest the evidence so that he could demonstrate his lawyer's mistake and establish its prejudicial effect. *Id.*

Osborne's defense lawyer submitted an affidavit defending her decision not to pursue independent DNA testing using the more discriminating restriction-fragment-length-polymorphism (RFLP) method.[4] Pet. App. 97a-98a. The results of the State's less

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[3] The Alaska Supreme Court denied Osborne's request for discretionary review. *Osborne v. State*, No. S-7549 (Alaska, September 3, 1996). Osborne sought no further direct review.

Osborne received mandatory parole on June 26, 2007. He was arrested on December 29, 2007, and has been charged with multiple counts of kidnapping, armed robbery, assault, burglary, and weapons misconduct, stemming from a break-in to an Anchorage home in which four victims were bound with duct tape and pistol-whipped. *See State v. Osborne*, No. 3AN-07-14638 Cr. (Alaska Super. Ct.) (information filed December 29, 2007). Those charges and a petition to revoke Osborne's probation, *see State v. Osborne*, No. 3AN-S93-2339 Cr. (Alaska Super. Ct.) (filed January 8, 2008), are pending.

[4] The RFLP testing, a non-PCR-based method that requires a relatively large and non-degraded sample, "has a high degree of discrimination." *Postconviction DNA Testing* at 26-27. Depending on the number of loci tested, RFLP testing can reduce the probability of a random match to as low as one in billions. *Future of Forensic DNA Testing* at 15-16.

discriminating DQ-alpha DNA test, Osborne's lawyer explained, were statistically "in Osborne's favor, due to a relatively high frequency in the population of the profile of the case DNA." Pet. App. 98a. She reasoned that because the State's test established that about 1-in-6 African-American males had the same DQ-alpha profile as Osborne's, those were "very good numbers" to make a case for mistaken identity, particularly given that the crimes took place at night, K.G. had poor vision, and Osborne was African-American whereas K.G. was Caucasian (thus implicating, in the lawyer's view, the difficulties inherent in "cross-racial identification cases"). *Id.* These factors, Osborne's lawyer concluded, put Osborne in a "strategically better position without [more specific] DNA testing," which the lawyer believed would only confirm Osborne as the perpetrator. *Id.*

In an unpublished order, the state court denied Osborne's application, finding that his lawyer had made a reasonable tactical decision by rejecting independent DNA testing because she disbelieved Osborne's claim of innocence and wanted to avoid creating evidence that would confirm his guilt. J.A. 19-21. Because Osborne had not asserted a prima facie case of ineffective assistance, the trial court denied his request to retest the biological evidence. *Id.* at 22.

Osborne sought reconsideration, asserting for the first time that he was entitled to perform new DNA testing as a matter of due process to establish his innocence. Pet. App. 99a. Osborne did not, however, assert a substantive claim based on his actual innocence. Based on the specific facts of Osborne's case, the trial court rejected this access-to-evidence

claim under the due-process and fairness doctrines of both the state and federal constitutions. *Id.*

Osborne appealed to the Alaska Court of Appeals, which affirmed in part and remanded. Pet. App. 92a. The record confirmed that Osborne's defense lawyer had made a reasonable tactical decision to forgo more conclusive DNA testing, which would have risked providing the State "additional evidence that would incriminate Osborne." *Id.* at 101a. Accordingly, the Court of Appeals affirmed the trial court's ruling that Osborne had failed to establish a prima facie case of ineffective assistance.

The Court of Appeals next addressed Osborne's access-to-evidence-of-actual-innocence claim. Pet. App. 102a-12a. After reviewing state and federal case law, the court concluded that "Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence." *Id.* at 109a. At the same time, the court noted that Alaska's postconviction-relief statute allows a defendant to seek postconviction relief based on newly discovered evidence that clearly and convincingly establishes his innocence, so long as (1) he has been diligent in presenting the claim and (2) the new evidence was unknown within the two years following the judgment of conviction. *Id.* at 104a (citing Alaska Stat. 12.72.020(b)(2) (2005)). The court opined that Osborne could not satisfy these two conditions. *Id.* at 109a.

But the Court of Appeals expressed its "reluctan[ce] to hold that Alaska law offers no remedy to defendants who could prove their factual innocence." Pet. App. 111a. Acknowledging that Alaska law *might* recognize such claims, the court established a procedure—similar to the procedures in other

states—whereby Osborne could obtain postconviction DNA testing if he could show: (1) that his conviction rested "primarily" on eyewitness identification; (2) that there was "demonstrable doubt" concerning his identification as the perpetrator; and (3) that "scientific testing would likely be conclusive" on his identity. *Id.* at 111a. The court remanded the case for consideration whether Osborne could meet that test. *Id.*

On remand, the state trial court found that Osborne failed to meet any of the three parts of this test. J.A. 214-22. Osborne did not meet the first and second parts because K.G.'s identification of him both before and at trial had been corroborated by physical evidence and other evidence that placed Osborne and Jackson together on the night of the crime: (1) twice before the crimes took place, Osborne had telephoned Jackson from the arcade where Jackson picked him up; (2) Osborne was seen getting into Jackson's car shortly before the crimes occurred; (3) tickets from the arcade were found in Jackson's car; (4) witnesses saw Osborne and Jackson together shortly after the crimes occurred, and some of these witnesses observed blood on Osborne's clothing; and (5) K.G.'s initial description of her attackers had been consistent with Osborne's physical characteristics. *Id.* at 215-16, 218-19.

The trial court also concluded that Osborne had failed to meet the third part of the test, which required him to demonstrate that the new DNA testing would likely be conclusive on whether he was the perpetrator. J.A. 219-22. The court based its conclusion on the possibility that new testing that excluded Osborne as the donor of the semen inside the condom might signify nothing more than that the

condom found by the police was not the condom used in K.G.'s rape. *Id.* The court found additional support in the other evidence linking Osborne to the crimes and in the fact that, following his convictions, Osborne had confessed to the crime—both in writing and orally—when he had applied for parole. Pet. App. 71a & n.11 (containing Osborne's verbatim written statement), 73a.

Osborne again appealed to the Alaska Court of Appeals, which in 2007 affirmed the trial court's findings and conclusion. Pet. App. 82a. At the same time, a majority of the court explained in a separate concurring opinion that the Alaska Constitution "might require" a court to hear a postconviction innocence claim by a defendant who presented "clear genetic evidence" of innocence. Pet. App. 89a (Mannheimer, J., concurring). But, based on the trial court's analysis of the evidence against Osborne and his confession of guilt, the Court of Appeals concluded that Osborne could not meet that threshold and "conclusively establish" his innocence, even if new test results were favorable to him.[5] Pet. App. 89a-90a.

Osborne's federal civil-rights action. In 2003, after Osborne's state postconviction-relief application had been initially denied, but while his first appeal to the Alaska Court of Appeals was still pending, he filed a civil-rights action under 42 U.S.C. § 1983 in federal district court. J.A. 23. Osborne alleged that an unopposed order issued in his state postconviction-relief case had required the State to preserve

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[5] The Alaska Supreme Court denied Osborne's request for discretionary review. *Osborne v. State*, No. S-12799 (Alaska, January 22, 2008).

all evidence in his underlying criminal case. J.A. 36. He further alleged that he had directly asked the District Attorney's Office "to provide access to the biological material for the purposes of DNA testing," but that request had been refused. *Id.* at 36-37. The State did not contest these allegations.

Osborne did not, however, challenge the state court's rejection of his ineffective-assistance claim, its rejection of his due-process claim, or the findings made in connection with those two adverse rulings—all of which were then pending appeal to the Alaska Court of Appeals. Nor did he challenge the state court's application of state due-process standards or contend that the state procedures as a whole violated federal due process.

Instead, Osborne asserted that the District Attorney's refusal to produce the evidence violated: (1) his due-process right of access to evidence, citing *Brady v. Maryland*, 373 U.S. 83 (1963); (2) his due-process right to have "the opportunity to make a conclusive showing that he is actually innocent"; (3) his right against cruel and unusual punishment by denying him the opportunity to prove his innocence; (4) "his right to a fair executive clemency proceeding where he can make a showing of actual innocence"; (5) his right to confrontation and compulsory process by depriving him of his right to prove his innocence in state and federal court and before the Alaska Parole Board; and (6) his right to meaningful access to state and federal court to establish his actual innocence. J.A. 37-39. Osborne thus implied that he intended to use the evidence to prove his innocence not in the § 1983 action itself but in other federal and state proceedings. *Id.*

Osborne specifically described the evidence he sought to retest as follows: (1) the semen from the condom that was asserted to have been used in K.G.'s rape; (2) a pubic hair found inside the condom; and (3) a pubic hair found on a sweater that was under K.G. during the rape. J.A. 24. Osborne also stated that he wanted to perform DNA testing on K.G.'s clothing and on reference samples obtained from K.G., Osborne, Jackson, "and alternate [but unnamed] suspects." *Id.* Osborne stated that he wanted to submit this evidence for new DNA testing, using the short-tandem-repeat (STR) and mitochondrial (mtDNA) methods.[6] *Id.*

The district court dismissed Osborne's complaint, concluding that because his claim was "seek[ing] to set the stage" for an attack on his underlying conviction, under *Heck v. Humphrey*, 512 U.S. 477 (1994), it had to be asserted in a petition for writ of habeas corpus. J.A. 207.

Osborne appealed to the Ninth Circuit. The court reversed, holding that success on Osborne's claim would not necessarily demonstrate the invalidity of his confinement and, therefore, under *Heck*, he could proceed under § 1983. Pet. App. 58a-59a. According to the court, Osborne's success would merely afford him access to the evidence he sought and thus would

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[6] The STR method is similar to the RFLP method, except it is PCR-based, allowing the use of smaller-sized and more degraded samples. *Future of Forensic DNA Testing* at 17-18. Using the 13 loci that have become the standard, "the general match probability is about one in 6 x 10^{14}". *Id.* at 18. The mtDNA method is generally reserved for samples, such as hair, that are unsuitable for RFLP and PCR testing due to a lack of, or highly degraded, nuclear DNA. *Postconviction DNA Testing* at 28.

have no effect on the validity of his confinement. *Id.* The court remanded the case for consideration of whether Osborne had a federally protected right of access to the biological evidence. *Id.* at 62a. On remand, the district court granted Osborne's motion for summary judgment (and denied the State's cross-motion). Pet. App. 50a. The State then appealed.

At the oral argument before the Ninth Circuit, Osborne expanded the scope of the testing he wanted to do, stating for the first time that he wanted to test epithelial cells found on the outside of the condom.[7] Forensic examination during the original police investigation of this case had revealed epithelial cells on the outside of the condom. Pet. App. 38a. The presence of epithelial cells indicated that the condom had been used to penetrate a person's mouth, rectum, or vagina. *Id.* At no time during Osborne's state postconviction proceedings did he assert any connection between his innocence claim and the epithelial cells. Nor does there appear to be any reference to them in the federal-court record until the second Ninth Circuit argument.

The Ninth Circuit affirmed. Pet. App. 1a-2a. The court concluded that Osborne had a right to post-conviction access to biological evidence that might be material to the freestanding innocence claim he hoped to make. Pet. App. 44a. The court based this conclusion on "the due process principles that motivated *Brady*." *Id.* at 15a-19a. The court assumed that a freestanding innocence claim might be legally

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[7] *See* Recording of oral argument at time 26:35, 43:10, *District Attorney's Office v. Osborne*, No. 06-35875 (9th Cir., October 10, 2007), available at http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1 (search for "06-35875"; then download file "06.35875.wma") (last visited November 20, 2008).

cognizable in state court and was legally cognizable in federal court and then reasoned that Osborne should have access to the evidence even though he had not yet asserted such a claim. *Id.* at 19a-23a.

SUMMARY OF ARGUMENT

Through this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, Osborne improperly seeks to obtain discovery of evidence that he contends may prove that he is innocent of the crimes for which he was fairly convicted in state court. Not only is § 1983 an improper vehicle for this claim, but in the absence of a properly asserted, cognizable claim of actual innocence, there is no federal constitutional right to postconviction discovery. The Ninth Circuit's decision to the contrary should be reversed.

1. The writ of habeas corpus is the exclusive procedure for state prisoners to collaterally challenge in federal court the constitutional validity of their convictions. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Congress built into the habeas procedure mechanisms that preserve and promote principles of federalism and comity, requiring exhaustion of state judicial remedies as a predicate to habeas review and extending substantial deference to the factual and legal determinations by state courts. *See* 28 U.S.C. § 2254(b), (d), (e).

Osborne has not filed a federal habeas action, although he makes no secret of the fact that he seeks to invalidate his state conviction based on a claim of actual innocence—a claim that falls squarely within the core of habeas corpus. Instead, Osborne filed a complaint under 42 U.S.C. § 1983, omitting his substantive claim and requesting only the discovery of evidence to support that unasserted claim. In

short, he has split the component parts of a single action into separate proceedings.

Osborne's piecemeal litigation strategy fails for two reasons. First, discovery does not exist in a vacuum. Orderly process requires the assertion of a substantive claim, which provides the necessary context for determining the materiality of discovery and assures that threshold issues, such as cognizability and jurisdiction, are resolved before discovery proceeds. Second, the federalism concerns reflected in the federal habeas statute cannot be so easily evaded. The state-federal balance established by Congress does not permit a federal court to intercede in Osborne's quest to obtain evidence in what, at the time, was a state postconviction proceeding. Only through the assertion of a federal habeas claim does a state prisoner properly engage the attention of the federal court in relation to a potential claim of actual innocence.

This conclusion is consistent with this Court's decisions interpreting and expanding on *Preiser*'s rationale for exclusive habeas jurisdiction. Those cases make clear that a prisoner may not avoid habeas through artful pleading. Omitting one's substantive claim—a claim that would indisputably fall within federal habeas—is the essence of artful pleading.

But even if Osborne could pursue discovery separately, § 1983 is still unavailable to him. Even when a claim does not directly attack the validity of a state conviction, § 1983 may not be used if proof of that claim will necessarily impugn the validity of the conviction. Here, Osborne's claim for evidence that might prove his actual innocence is not outcome neutral; it is in fact the *sine qua non* of his innocence

claim. Few things cast as much doubt on a state conviction as proof of innocence. To hold otherwise would ignore the concerns and reasoning of *Preiser* and subsequent cases.

2. Even if Osborne were able to pursue relief under § 1983, the Constitution does not recognize a stand-alone postconviction right of access to evidence. The Ninth Circuit reached a contrary result by relying on *Brady v. Maryland*, 373 U.S. 83 (1963), which created a pretrial right to exculpatory evidence to ensure a fair trial. Not surprisingly, this Court has never recognized a *Brady* right after the defendant has received a fair trial.

Such an extension of *Brady*, moreover, would be unwarranted. A right to obtain evidence of actual innocence cannot exist apart from a right to assert actual innocence as grounds for relief from a state conviction. But this Court has never recognized the existence of a freestanding actual-innocence claim. The Ninth Circuit's *assumption* that such a federal claim exists does not make it so. Likewise, speculation as to the existence of an actual-innocence claim under state law does not fill this critical void.

The Ninth Circuit's recognition of a novel due-process right in this setting is especially problematic for at least four additional reasons. First, this Court has consistently refused to impose federal constitutional requirements on state postconviction proceedings. Second, by failing to define the specific state procedure at issue, the Ninth Circuit improperly divorced procedure from procedural context. Third, the Ninth Circuit appeared to apply "meaningful access" principles outside the context of a "meaningful access claim. Fourth, basic federalism concerns preclude such federal intrusion in an area

over which this Court has extended enormous deference to the States.

The practical implications of the Ninth Circuit's stand-alone discovery right, moreover, are staggering. By establishing a one-size-fits-all solution, the Ninth Circuit has left in doubt the constitutionality not only of the Alaska Court of Appeals's approach to the issue, but also the postconviction DNA statutes adopted by 44 States, the District of Columbia, and the Federal Government. These statutes reflect a careful balancing of the government's interests in finality, comity, and conservation of scarce resources against a prisoner's interest in justice in those rare cases where the prisoner's identity as the perpetrator is truly in doubt and changes in forensic technology could establish actual innocence. At the very least, this balancing—and the limits on discovery that it suggests—must be incorporated into any federal right of access. The Ninth Circuit's "open the evidence locker" approach ignores these competing concerns and, as a result, cannot be imposed in the name of the Due Process Clause.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN ALLOWING OSBORNE TO USE § 1983 AS A DISCOVERY DEVICE IN LIEU OF FILING A FEDERAL HABEAS PETITION

Osborne is attempting to use 42 U.S.C. § 1983 as a vehicle for obtaining discovery relating to a not-yet-asserted frontal attack on his state convictions. But attacks in federal court on the validity of state convictions are the exclusive province of habeas corpus, 28 U.S.C. § 2254, and may not be brought under § 1983. *See Preiser*, 411 U.S. at 490, 500

(habeas corpus is "appropriate remedy" for state prisoners attacking the validity of confinement). The fact that Osborne has artificially severed his discovery request from his intended challenge to his conviction does not allow him to avoid this bedrock principle, any more than the principle can be avoided through the "simple expedient" of artful pleading. *Id.* at 489-90.

A. The Substantive Claim to Which the Requested Discovery Relates Falls Squarely Within the Core of Habeas

Stripped to its essence, Osborne's § 1983 action is nothing more than a request for evidence to support a hypothetical claim that he is actually innocent. Under *Preiser*, this hypothetical claim sounds at the core of habeas corpus, and Osborne therefore must submit to the rigors of habeas corpus jurisdiction.[8]

In *Preiser*, state prisoners sought injunctive relief under § 1983, claiming they were entitled to release based on the unconstitutional deprivation of good-time credits. Though § 1983 literally covered the claims, the Court reasoned that the prisoners must proceed under the habeas statute, which was "explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement." 411 U.S. at 489. A prisoner's claim going "directly to the constitutionality of his physical

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[8] Petitioners do not, of course, concede that Osborne has a substantive federal constitutional right to the testing. *See* section II, *infra*. *Cf. Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) ("[T]he Court's opinion focuses correctly on whether the claims respondents pleaded were claims that may be pursued in habeas—not on whether respondents can be successful in obtaining habeas relief on those claims.").

confinement itself" and seeking immediate release "is just as close to the core of habeas corpus as an attack on the prisoner's conviction." *Id.* Therefore, Congress's determination that "habeas corpus is the appropriate remedy for state prisoners attacking the fact or length of their confinement . . . must override the general terms of § 1983." *Id.* at 490.

The Court's conclusion was driven, in part, by Congress's amendment to the habeas statute to require exhaustion of adequate state remedies, a requirement that would be nullified if the prisoners' claims were allowed to proceed under § 1983: "It would wholly frustrate explicit congressional intent to hold that the respondents . . . could evade this requirement by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-90. And the conclusion was bolstered by the strong "considerations of federal-state comity" underlying federal habeas review of state convictions. *Id.* at 490-91. Thus if a request for relief is close to the traditional core of habeas corpus, it must be brought in habeas even when it comes within the literal terms of § 1983. *Id.* at 489-90.

Osborne's unasserted substantive claim—namely, that his conviction cannot stand in the face of hypothetical new DNA testing establishing actual innocence—lies at the core of federal habeas corpus. Both the common-law history of the writ and the language of the habeas statute establish "that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser*, 411 U.S. at 484; *accord Munaf v. Geren*, 128 S.Ct. 2207, 2221 (2008). Indeed, the early American use of the writ

"routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner." *Boumediene v. Bush*, 128 S.Ct. 2229, 2267 (2008). *See also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970) (advocating that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence"). This perfectly describes Osborne's intended but unasserted substantive claim.

B. Osborne Cannot Avoid Habeas Jurisdiction by Severing His Discovery Request from Its Related Substantive Claim

Osborne's intended substantive claim falls squarely within the domain of federal habeas corpus. The fact that Osborne elected to split that claim between a § 1983 action, seeking only access to evidence, and an as-yet-unfiled action for substantive relief to which that evidence would relate, does not alter this conclusion. Allowing Osborne to split his claim and proceed under § 1983 would violate basic rules of orderly process and would permit Osborne to circumvent the federalism and comity-based concerns embodied in the federal habeas statute.

1. One of the most basic assumptions of the procedural rules governing most state and federal litigation is that discovery takes place in the context of a substantive claim or factual representation formally asserted in a complaint or petition. *See, e.g.*, Fed. R. Civ. P. 26(b)(1) (unless limited by court order, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim

or defense"). A substantive claim establishes what evidence will be material as well as the procedure for the orderly discovery of that evidence under judicial oversight. "The federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others." *Houston Business Journal, Inc. v. Office of the Comptroller of Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) (holding that federal court lacked jurisdiction to order discovery from nonparty in connection with state-court litigation). *Cf. Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (federal civil discovery rules are designed to facilitate narrowing and clarifying issues and ascertaining facts relevant to those issues).

Osborne's severance of discovery from substantive claim also allows Osborne to avoid critical procedural issues that would normally precede discovery. This potential for circumvention is apparent when one considers the hypothetical substantive proceedings in which Osborne might use the requested discovery.

For example, if he were to assert a freestanding claim of actual innocence in federal court, he would first have to establish the cognizability of that claim—a question that is in serious dispute, as discussed later in this brief. *See House v. Bell*, 547 U.S. 518, 554-55 (2006) (declining to decide whether freestanding claim of actual innocence is cognizable in federal court); *Houston Business Journal*, 86 F.3d at 1213 (federal discovery rules "facilitate actions cognizable in federal court").

If, on the other hand, Osborne were to assert a new postconviction claim in state court, then he would have to satisfy the three-part standard established by the Alaska Court of Appeals for obtaining post-

conviction access to evidence. *See* Pet. App. 111a. And if he wanted federal-court review of the constitutionality of the state standard or the state courts' refusal to grant access, he would have to seek from this Court a writ of certiorari, since federal district courts lack jurisdiction to conduct appellate review of state court decisions. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

The detachment of Osborne's discovery request from his substantive claim represents a piecemeal strategy that has no precedent and should be disallowed. *Cf. Sanders v. United States*, 373 U.S. 1, 18 (1963) (discussing abusive use of writ and noting that "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation"); *First Commercial Trust Co. v. Colts Mfg. Co., Inc.*, 77 F.3d 1081, 1088 n.4 (8th Cir. 1996) ("Litigants, of course, have no right to discovery in the absence of a plausible legal theory."). When Osborne's asserted procedural right—access to evidence—is properly viewed as inseparable from his unasserted substantive claim—his claim of actual innocence—it becomes clear that he is improperly using § 1983 as an indirect challenge to his state convictions. If it were otherwise, a prisoner could use a series of § 1983 actions to assemble the constituent parts of his case before formally challenging his conviction in a federal habeas petition or state post-conviction relief application. Indeed, that is exactly what Osborne is doing here.

2. In addition to upending the usual and logical course of litigation by allowing discovery before claim, the Ninth Circuit's decision circumvents criti-

cal concerns underlying the federal habeas statute and thereby has the potential to "wholly frustrate explicit congressional intent." *Preiser*, 411 U.S. at 489.

At the most obvious level, allowing Osborne to use a § 1983 action as a discovery tool conflicts with and undermines the discretionary discovery regime created by Congress for habeas cases. Unlike the mandatory regime in other types of civil cases, discovery in habeas is left to the discretion of the district court. *See Drake v. Portuondo*, 321 F.3d 338, 346 (2d Cir. 2003) (citing Rule 6(a), Rules Governing Section 2254 Cases, foll. 28 U.S.C. § 2254 (giving habeas courts discretion to permit discovery in habeas cases "for good cause shown")).

On a more fundamental level, by establishing discovery rules for what is essentially a state post-conviction-relief proceeding, the Ninth Circuit's approach upsets the delicate state-federal balance struck by both Congress and this Court for federal review of state criminal convictions. Federalism concerns animate many aspects of federal habeas corpus jurisprudence. *See Boumediene*, 128 S.Ct. at 2268 (habeas framework "respects federalism" by deferring to state courts' factual findings and requiring exhaustion of state remedies, which are "justified" by assumption that state courts normally provide fair trials to defendants); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (habeas review unavailable when state-court decision rests on independent state-law ground that is adequate to support judgment); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (doctrines of procedural default and abuse-of-writ both "seek to vindicate the State's interest in the finality of its criminal judgments").

These same concerns are mirrored in Congress's 1996 amendments to the habeas statute. *See* Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219. Significant among the amendments is the requirement that federal habeas courts give substantial deference to the factual and legal determinations of state courts. *See* 28 U.S.C. § 2254(d), (e). Congress's objective was "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law," *Williams (Terry) v. Taylor*, 529 U.S. 362, 386, 404 (2000), as well as "to further the principles of comity, finality, and federalism," *Williams (Michael Wayne) v. Taylor*, 529 U.S. 420, 436 (2000).

The faithful implementation of these federalism concerns dominates *Preiser*. That is, prisoners may not use § 1983 actions to contravene Congress's intent that challenges in federal court to state convictions be channeled only through the habeas process. Thus, the Court has been "careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of the criminal and collateral proceedings." *Williams (Michael Wayne)*, 529 U.S. at 436. Allowing the federal court to act as a state discovery master does equal violence to these federalism concerns.

In fact, this Court has cautioned that, although federal courts may be eager "to vindicate and protect federal rights and federal interests," they should do so only "in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Allowing a federal court to intervene while a state postconviction action

is pending and to direct the discovery of evidence in that state action smacks of that very federal intrusion that Congress sought to preclude and against which this Court has cautioned.

C. Severance of Osborne's Discovery Request from His Substantive Claim Is Inconsistent with *Heck v. Humphrey*'s Caution Against Artful Pleading

Nothing in the cases decided since *Preiser*, including this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), would allow Osborne's access-to-evidence claim to proceed under § 1983. *Preiser* made clear that claims challenging the fact or duration of confinement and seeking immediate or earlier release lie at "the core of habeas corpus" and are therefore cognizable exclusively in habeas. *Preiser*, 411 U.S. at 489, 500. *Heck* addressed a slightly different situation—the assertion of a damages claim, which could not be brought in habeas, but the proof of which would necessarily imply the invalidity of the prisoner's state conviction or sentence. Drawing on the common-law principles governing claims of malicious prosecution, the Court concluded that the prisoner's damages claim could not be brought under § 1983 unless he could first prove that the underlying conviction had been invalidated in a separate proceeding (presumably a federal habeas action or appropriate state proceeding). *Heck*, 512 U.S. at 486-87.

In this case, the Ninth Circuit held that Osborne's § 1983 action was not barred by *Heck* because success in the action would not necessarily imply the invalidity of his conviction. Pet. App. 58a-59a. Success would mean only that Osborne obtained access to the evidence (the testing of which could inculpate

him or at least be inconclusive), and "even if the results exonerate Osborne, a separate action—alleging a separate constitutional violation altogether—would be required to overturn his conviction." *Id.* at 58a-59a

The Ninth Circuit's analysis overlooks this Court's repeated admonition (not only in *Preiser* but in the *Heck* line of cases) that prisoners should not be allowed to circumvent the congressional limits on habeas through artful pleading. *Preiser*, 411 U.S. at 489-90 ("It would wholly frustrate explicit congressional intent to hold that the [prisoners] . . . could evade th[e] [habeas exhaustion] requirement by the simple expedient of putting a different label on their pleadings."). Nor should prisoners be allowed to use artful pleading to avoid the boundary between habeas and § 1983. *Cf. Nelson v. Campbell*, 541 U.S. 637, 645 (2004) ("Merely labeling something as part of the execution procedure is insufficient to insulate it from a § 1983 attack."). Indeed, a central premise of *Heck* is that that the form of relief sought by a prisoner in the complaint is not necessarily dispositive of whether a claim is cognizable under § 1983. Whereas *Preiser* had suggested that prisoners who seek damages are not attacking the fact or length of their confinement, *Preiser*, 411 U.S. at 494, *Heck* pointed out that this was not true "when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction," *Heck*, 512 U.S. at 481-82.

If a prisoner cannot avoid *Preiser* and *Heck* through artful drafting of his complaint for relief, it follows that he should not be able to avoid those precedents by omitting his real substantive claim altogether. Yet that is precisely what Osborne has

done here. It is undisputed that, if Osborne had included an actual-innocence claim in his § 1983 action, that action would be barred by *Heck*, because success on that claim would necessarily imply the invalidity of his criminal convictions. It makes no sense to permit a prisoner to avoid both the *Preiser* and *Heck* bars by deliberately omitting the substantive claim he is advancing and by instead dressing up a discovery request in service of that claim as a § 1983 action. That cannot be right.

Where, as here, a prisoner deploys a § 1983 lawsuit as a discovery device in service of an unasserted claim that is barred by both *Heck* and *Preiser*, the § 1983 suit is also barred. Any other result would allow circumvention of *Heck* and *Preiser* through the clever stroke of a pen. Because Osborne is using § 1983 as just such an ancillary discovery device, and in doing so hoping (at best) to develop evidence to support a claim of actual innocence that plainly *would* be barred by *Heck* and *Preiser*, his lawsuit is also barred by those authorities.

D. Even If Osborne Can Sever His Discovery Request from the Substantive Claim He Might Assert, His § 1983 Claim Would Still Be Barred

Even if the Court focuses (as the Ninth Circuit did) solely on the access-to-evidence claim included in Osborne's § 1983 complaint—and ignores the actual-innocence claim he left out—Osborne's claim is still barred by *Heck*. Indeed, the Ninth Circuit itself recognized the close relationship between Osborne's access-to-evidence claim and the validity of his conviction when it linked the standard for obtaining access to the likelihood that the evidence would

establish Osborne's innocence. The Ninth Circuit required Osborne to show "a reasonable probability that, if exculpatory DNA evidence were disclosed . . . , he *could prevail* in an action for post-conviction relief." Pet. App. 27a-28a (emphasis added). Osborne could meet that standard by establishing "a reasonable probability that [he] could 'affirmatively prove that he is probably innocent.'" *Id.* (quotation omitted). Thus, although the Ninth Circuit did not require Osborne to establish his innocence (i.e., whether he would "be granted habeas relief with the evidence"), it did require him to show that the evidence he sought would—if exculpatory—plausibly establish his innocence. Because *that* showing would necessarily imply the invalidity of Osborne's convictions, his access-to-evidence claim is barred by *Heck*.

Two cases decided after *Heck*—*Edwards v. Balisok*, 520 U.S. 641 (1997), and *Wilkinson v. Dotson*, 544 U.S. 74 (2005)—illustrate this point and provide a useful contrast between a claim that has a sufficiently close connection to the "core" of habeas corpus so as to preclude a § 1983 claim (*Balisok*) and one that does not and therefore may proceed under § 1983 (*Dotson*).

In *Dotson*, two prisoners sought declaratory and injunctive relief under § 1983, claiming that state parole procedures were unconstitutional on ex-post-facto and due-process grounds. Although the prisoners clearly hoped that success on their claims would result in their earlier release on parole, that result was in no way certain. The prisoners' procedural challenge did not implicate the substance of their eligibility for parole because the protections they sought were too remote to the decisions that would actually affect their parole eligibility or re-

lease. Success in the § 1983 action would provide the prisoners with, at most, opportunities for new or earlier parole hearings. *Dotson*, 544 U.S. at 82. This Court thus concluded that "the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective." *Id.* at 78. And because the connection between claim and release was "too tenuous," the prisoners were not required to bring their challenge in the form of a federal habeas claim.

The prisoner in *Balisok* sought damages and declaratory relief under § 1983, claiming that he was deprived of good-time credits at a hearing where he was denied the opportunity to present witness statements on his behalf after the hearing officer falsely stated that no such statements had been submitted. *Balisok*, 520 U.S. at 644-45. The prisoner argued that declaratory relief in his favor would not necessarily imply the invalidity of the decision denying the credits, since an unbiased hearing officer with the benefit of the omitted witness statements might still deny the credits.

This Court rejected the prisoner's arguments, holding that his claims were subject to the *Heck* doctrine. *Balisok*, 520 U.S. at 648. Although the prisoner was challenging only the procedure used to deny the credits, and not the substance of the decision to deny, "the nature of the challenge to the procedures" would, if successful, "necessarily . . . imply the invalidity of the judgment." *Id.* at 645. That is, proof of the hearing officer's deceit and bias would certainly entitle the prisoner to vacation of the decision denying the credits; no court would allow the decision to stand. *Id.* at 646-47. Thus, a ruling in his

favor regarding the hearing officer's actions would necessarily imply the invalidity of the deprivation of the credits by making their restoration all but a foregone conclusion. *Id.*

A comparison of *Dotson* and *Balisok* is useful in analyzing Osborne's access-to-evidence claim. Unlike the prisoners in *Dotson*, Osborne is not asserting an outcome-neutral procedural claim. Instead, like the prisoner in *Balisok*, if Osborne proves that access to the DNA evidence will allow him to conclusively prove that he is factually innocent of the offenses for which he was convicted, that determination will necessarily imply the invalidity of his convictions and, by extension, his confinement. In fact, it is this very proposition—that it is inherently unfair or invalid to incarcerate an innocent person—upon which Osborne's arguments hinge.

In this respect, Osborne's § 1983 claim also closely resembles the claims asserted in *Heck*. The prisoner in *Heck* sought damages based on purportedly wholesale and egregious due-process violations resulting in his conviction. As the Court observed, to prove his entitlement to damages would require proof of those violations, the nature of which would necessarily impugn the validity of his conviction. *Heck*, 512 U.S. at 486-87. Osborne's case follows the same trajectory. Just as the prisoner in *Heck* intended to establish his right to damages, Osborne intends to perform new DNA testing on the evidence he seeks and purportedly hopes that the testing will establish his innocence. And just as the proof of the damages claim in *Heck* necessarily impugned the validity of the prisoner's conviction, new testing of evidence in Osborne's case will impugn the validity of his convictions if the results are fully favorable to

Osborne. The only real difference in the two cases is that the "proof" that necessarily implies the invalidity of Osborne's convictions will take place extrajudicially, in a laboratory, rather than in the courtroom.

At first blush, the focus on what Osborne intends to do with the evidence might appear similar to the argument rejected in *Dotson*, where Ohio argued that the prisoners could not pursue relief under § 1983 because "they believe that victory on their claims will lead to speedier release from prison." *Dotson*, 544 U.S. at 78. The Court rejected this argument as "jump[ing] from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief)." *Id.* But the connection between the challenged procedures and release from confinement was "too tenuous" to satisfy the *Heck* doctrine. *Id.* The prisoners' release depended on the exercise of discretion by the parole board, which—and this is the crucial point—the challenged procedures would not affect. In sharp contrast, the connection in Osborne's case is elemental: obtaining access to the evidence is the *sine qua non* of Osborne's intended innocence claim.

The Ninth Circuit also erred in treating the inquiry set forth in *Heck* and in later cases such as *Dotson*—namely, whether success in the § 1983 action "would necessarily demonstrate the invalidity of confinement or its duration," *Dotson*, 544 U.S. at 81-82—as the *exclusive* test for whether a prisoner may proceed under § 1983. The Ninth Circuit over-read *Dotson* and misunderstood the *Heck* doctrine.

For starters, the relevant passage—an attempt to find a common denominator in a sprawling body of

cases—says only that a § 1983 action is barred *if* success in that action would necessarily imply the invalidity of confinement. It does *not* say that a § 1983 action is barred *only if* success in the action would necessarily imply the invalidity of confinement. That is, even assuming (contrary to the argument above) that courts should ignore the substantive claims omitted by prisoners in § 1983 actions, an affirmative answer to the "necessarily demonstrates invalidity" question is *sufficient* to trigger the *Heck* bar to a § 1983 action, but it is not *necessary*. And a negative answer, while informative, is not conclusive.

Beyond that, the *Heck* doctrine was developed to address a different situation than Osborne's, occurring when a prisoner's § 1983 action requests a form of relief—such as damages or a declaration—that is *not available in habeas*, but where success in the lawsuit would call into question the legality of the confinement or sentence. *See Heck*, 512 U.S. at 481; *see also Dotson*, 544 U.S. at 91 (Kennedy, J., dissenting) (noting that both *Heck* and *Balisok* involved prisoners who sought "only relief unavailable in habeas . . . and thus [sought] to do an end run around *Preiser*"). *Dotson* was also a case in which the requested relief—a new parole hearing—was *not available in habeas*. *Dotson*, 544 U.S. at 82 (respondent prisoners' claims did not lie "at the core of habeas corpus"). When the relief sought is not available in habeas, it becomes necessary to mediate the potential conflict between habeas and § 1983 to ensure that a remedy available *only* in § 1983 remains available under circumstances that do not circumvent the many limitations built into habeas corpus by Congress. The *Heck* doctrine achieves that purpose.

Osborne's case does not raise the same problem. Here, the requested relief—access to biological evidence in the hands of state officials—is in fact a remedy that at least in some circumstances is available in habeas corpus proceedings. *See* Rule 6(a), Rules Governing § 2254 Cases; *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997). Indeed, Osborne sought to obtain this evidence in his state postconviction proceedings, arguing that he has both a federal and a state due-process right to that material so that he can conduct further DNA testing to support an actual-innocence claim. This same argument could be renewed by Osborne in federal habeas proceedings—although it would then be subject to the filters created by Congress. *See* 28 U.S.C. § 2254(d). Rather than seek such discovery through the orderly processes of a federal habeas proceeding, Osborne—without even waiting for the state postconviction proceeding to run its course—has broken off that discovery request and pressed it as an independent federal claim under § 1983.

The collision and circumvention problems raised by Osborne's § 1983 action are therefore different from the problems addressed by the *Heck* doctrine. But they are no less serious or destructive of Congress's intent as expressed in the federal habeas statute. The right to obtain evidence held by the State ordinarily arises in the context of actual litigation, whether criminal or civil. The notion that § 1983 could be employed as a freestanding federal discovery tool—disconnected from and deployed outside the context of the litigation in which the evidence sought is relevant—is deeply troubling. Where, as here, § 1983 is used in this fashion by a prisoner duly incarcerated under state law—based on a fair trial

and the assistance of a competent lawyer—the risk of undermining the orderly functioning of the state's postconviction procedures, not to mention Congress's orderly procedures for state habeas petitioners, is far from hypothetical. The potential for such problems warrants the use of the *Heck* doctrine in this setting even if success on Osborne's artfully pleaded § 1983 claim would not necessarily imply the invalidity of his conviction.

II. OSBORNE HAS NO FEDERAL CONSTITUTIONAL RIGHT TO OBTAIN POSTCONVICTION ACCESS TO THE STATE'S BIOLOGICAL EVIDENCE

The Ninth Circuit's unfounded extension of *Brady v. Maryland*, 373 U.S. 83 (1963), to the postconviction DNA context suffers from two fatal flaws. First, the *Brady* doctrine was formulated and is applied to secure the right to a fair trial by prohibiting the prosecution from withholding exculpatory evidence from defendants. Once a defendant has obtained a fair trial, the rights protected by the doctrine have been fully satisfied. Since the Constitution does not require postconviction review of state convictions by either federal or state courts, no doctrinal basis exists for extending *Brady* to the postconviction context, and no precedent of this Court supports the Ninth Circuit's having done so.

Second, even if the *Brady* doctrine were extended into the postconviction context, it should not give rise to a stand-alone right of discovery detached from a substantive claim to which the discovered evidence would relate. The Ninth Circuit created this right, wholly independent of any substantive claim, based on an erroneous assumption that the claim Osborne hopes to assert—a freestanding actual-innocence

claim—is cognizable in federal court. But this Court has never recognized the cognizability of that claim.

In addition to these flaws, the Ninth Circuit's decision infringes the substantial deference accorded the States in formulating rules and procedures for postconviction review of criminal convictions. Most of the States, as well as the Federal Government, have statutes (or case law or court rules) that provide postconviction access to DNA evidence. These statutes represent careful legislative compromises struck between the government's interest in finality and in avoiding needless administrative burdens, on the one hand, and the need to do justice in an extraordinary individual case, on the other. In striking these compromises, lawmakers have imposed reasonable limitations on postconviction access to DNA evidence. Osborne flunks the two core criteria that many of these statutes use in filtering postconviction access requests: he has confessed his guilt rather than declared his innocence; and there has never been any doubt that Osborne was the perpetrator. Osborne has received all the process he is due.

A. *Brady v. Maryland* Does Not Create a Freestanding Right to Gather Evidence in Support of a Challenge to the Accuracy of a Verdict

The Ninth Circuit extended *Brady* to create a postconviction right of access to evidence. *See* Pet. App. 16a, 23a. But *Brady* and the "due process principles that motivated" it, *id.* at 23a, have no application here. This Court has never extended *Brady* beyond conviction, and it should not do so here.

In *Brady*, this Court recognized that criminal defendants have a due-process right to receive from

the prosecution exculpatory evidence that "is material either to guilt or to punishment." 373 U.S. at 87. That doctrine now requires prosecutors to seek from those acting on their behalf evidence that would create a reasonable probability of an acquittal. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).

The exclusive rationale of the *Brady* doctrine is to ensure that the defendant receives a fair trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("[U]nless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside."); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Brady*, 373 U.S. at 87-88; *see also United States v. Ruiz*, 536 U.S. 622, 628 (2002) (right to receive exculpatory material is "part of [the Constitution's] basic 'fair trial' guarantee"). Accordingly, the *Brady* doctrine is limited to the trial phase of the criminal process.

This Court has never said that a State's disclosure obligation extends beyond a defendant's conviction. In fact, this Court's only mention of *Brady* in a post-conviction context appears to be in *Imbler v. Pachtman*, 424 U.S. 409 (1976). *Imbler* involved prosecutorial immunity under § 1983. The Court there recognized that a prosecutor's duty to disclose exculpatory evidence at trial was grounded in the Constitution, but noted that any duty that persisted after trial rested on non-constitutional ethical standards. *Id.* at 427 n.25.

Here, Osborne has never suggested that material evidence was suppressed at trial. Nor can he argue that his trial was unfair. Not only did the Alaska courts determine that Osborne's trial was error-free, but also that he received competent representation from his lawyer. *See* Pet. App. 102a, 118a.

The prosecution's disclosure obligation under *Brady* therefore has no bearing on this case, and the Ninth Circuit was wrong to conclude otherwise. *See Grayson v. King*, 460 F.3d 1328, 1338 (11th Cir. 2006) ("Grayson has no valid due process right of access to the biological evidence under *Brady* and its progeny in order to retest that evidence under new technology. Grayson received a fair trial, in which overwhelming evidence was presented against him."); *Harvey v. Horan*, 278 F.3d 370, 378-79 (4th Cir. 2002) ("Harvey does not state a valid *Brady* claim[.] . . . Harvey received a fair trial and was given the opportunity to test the DNA evidence during his trial using the best technology available at the time."); *id.* at 385 (King, J., concurring) (same).

B. The Ninth Circuit Incorrectly Addressed the Materiality of the Evidence Before Deciding Whether Osborne Has a Cognizable Claim to Which the Evidence Could Relate

Having created a novel *Brady* right, the Ninth Circuit next asked whether Osborne had established that the DNA evidence was sufficiently material to support a postconviction right of access. According to the Ninth Circuit, the standard of materiality "is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed to Osborne, he could prevail in an action for post-conviction relief." Pet. App. 28a. And, because Osborne intended to file a freestanding actual-innocence claim, "materiality would be established by a reasonable probability that Osborne could 'affirmatively prove that he is probably innocent.'" *Id.* (quotation omitted). Thus, the court jumped straight to the materiality of the requested discovery before resolving whether Osborne has a

cognizable claim for the substantive relief to which the purportedly material DNA evidence would relate.

This unusual leap to discovery makes some sense when viewed in light of the Ninth Circuit's incorrect reliance on *Brady*. *Brady* is a backwards-looking doctrine. It focuses the inquiry on issues that bore on the decision to convict a defendant: evidence is material under *Brady* when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding [i.e., trial] would have been different." *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in the judgment). By looking backward in the fashion of *Brady*, however—i.e., by focusing on the DNA evidence in light of Osborne's likelihood of guilt or innocence as established at his criminal trial—the Ninth Circuit overlooked Osborne's existing convictions at an error-free trial and the obvious forward-looking nature of Osborne's claim. That is, the Ninth Circuit did not address what will happen when Osborne tries to use the requested DNA evidence to obtain postconviction relief.

But materiality is not an intrinsic quality of evidence; it is an expression of the relationship between a piece of evidence and the issues in a particular case. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he substantive law will identify which facts are material."); *cf.* Fed. R. Evid. 401 advisory committee notes, para. 4 ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."). Any right to discovery is, therefore, mean-

ingless without some substantive claim with which to compare and analyze the evidence.

Allowing a discovery right to stand alone, apart from a formally asserted substantive claim, is directly contrary to orderly and accepted judicial process. *See, e.g.,* Fed. R. Civ. P. 12(b), (h) (requiring certain threshold defenses to be set forth in initial responsive pleading or motion before pleading and providing for waiver of those defenses if not so set forth). *See also Harvey v. Horan*, 285 F.3d 298, 299 (4th Cir. 2002) ("*Harvey II*") (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) ("The assertion of innocence, just as the assertion of any right, is intertwined with orderly process."). The Ninth Circuit's unprecedented reversal of accepted civil procedure compels the State to participate in discovery even though Osborne may have no legally cognizable claim to which the requested evidence may relate.

C. The Ninth Circuit Incorrectly Speculated That Osborne Would Be Able to Assert a Cognizable Claim of Actual Innocence When, in Fact, No Such Claim Has Been Recognized

The Ninth Circuit created a federal constitutional right to evidence that might establish innocence, but did so without determining whether the Constitution recognizes a substantive right to collaterally attack one's conviction based on a claim of actual innocence. If that claim is not cognizable, then Osborne can have no constitutional right to evidence whose only purpose is to support that claim. This is the flaw at the core of the Ninth Circuit's opinion in this case.

1. Before a court can extend *Brady*'s due-process principles to the postconviction context, the court must first "determine whether due process requirements apply in the first place." *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quotation omitted). That is, the court must determine whether there is a substantive right to assert an actual-innocence claim to which the procedural right would relate. A right protected by due process involves "more than an abstract need or desire" for the right and "more than a unilateral expectation; instead there must exist "a legitimate claim of entitlement to it." *Id.* (quotation omitted).

Indeed, Osborne must first formally assert some sort of innocence-based claim because only then will a court be able to identify the precise interest at stake, determine whether the interest is protected by the Constitution, and if so, then define the nature and contours of his procedural rights necessary to secure that interest. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (extending due-process protection to asserted right or liberty interest places matter outside arena of public debate and legislative action and requires Court to exercise "utmost care[,] . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court"); *id.* at 721 (requiring precise definition of nature and contours of newly asserted substantive right).

Here, the Ninth Circuit identified no recognized substantive right that allows a prisoner to collaterally attack a valid state conviction on the sole basis that the prisoner is actually innocent. Instead, the court *assumed* the existence of a right that has not yet been recognized by this Court.

As an initial matter, the Ninth Circuit was mistaken—Osborne has *never* so much as proclaimed his innocence. *See* J.A. 226-27 (Osborne's affidavit declaring that he has "always *maintained*" his innocence, that he "told [his] *attorney* [he] never did the crime[s]," and that new DNA testing "will prove once and for all time *either* [his] *guilt or* innocence." (emphasis added)). Osborne, moreover, has not settled on what sort of relief he might pursue in seeking to establish his actual innocence claim; the best he has done is to state the various options he might pursue.

An even larger problem exists with the Ninth Circuit's assumption. Despite this Court's twice declining to recognize a federal right to assert a freestanding actual-innocence claim, *House*, 547 U.S. at 554-55; *Herrera v. Collins*, 506 U.S. 390, 417 (1993), the Ninth Circuit inexplicably allowed Osborne's access-to-evidence claim to "proceed on the well-established assumption that his intended free-standing innocence claim will be cognizable in federal court." Pet. App. 22a.

No such "well-established assumption" exists. In *House* and *Herrera*, the Court assumed that a freestanding claim of innocence was cognizable only *for argument's sake*; it was apparent in each case that, even if such a claim existed, the defendant would be unable to meet the "extraordinarily high" evidentiary burden that would be required to prevail on the claim. *See House*, 547 U.S. at 555; *Herrera*, 506 U.S. at 418-19; *cf. id.* at 429 (Scalia, J., concurring) ("I do not understand it to be the import of today's decision . . . [to create] a strange regime that assumes permanently, though only '*arguendo*,' that a

constitutional right exists, and expends substantial judicial resources on that assumption.").

Here, though, the Ninth Circuit's assumption was not merely *arguendo*: the conclusion that Osborne has a constitutional right to the evidence stands or falls with the correctness of this assumption. For if the assumption is wrong, meaning that there is no freestanding federal claim of actual innocence, then Osborne could *not* "prevail in an action for post-conviction relief," Pet. App. 28a,—at least not an action of the type envisioned in the Ninth Circuit's opinion.

If Osborne has no recognized substantive right to prove his actual innocence, then he has no right of access to evidence whose only purpose would be to support an innocence claim. The Ninth Circuit attempted to bridge this obvious gap in Osborne's request for evidence by relying on its decision in *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992). Pet. App. 23a. But the prisoner in *Thomas* was seeking to test DNA evidence to support a "gateway" claim of actual innocence in a pending habeas action, *Thomas*, 979 F.2d at 749, a claim that this Court has expressly recognized as cognizable, *see Schlup v. Delo*, 513 U.S. 298, 315-16 (1995) (holding that actual-innocence claim "is . . . not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass" for court to consider merits of otherwise defaulted constitutional claim). The Ninth Circuit acknowledged that Osborne intends to make no such gateway claim. Pet. App. 19a. *But see* Br. Opp. at 31 (raising for first time possibility that Osborne would assert gateway claim).

2. This Court has also refused to require the States, under the Fourteenth Amendment's due-process guarantee, to provide their own mechanisms for convicted defendants to assert their actual innocence beyond the traditional motions for new trial and applications for executive clemency. *Herrera*, 506 U.S. at 407, 411, 416-17. Thus, the Ninth Circuit's approach cannot be rescued by its speculation that Osborne might have "at least a potentially viable opportunity of bringing a freestanding actual innocence claim" in the Alaska state courts. Pet. App. 19a-20a. The Ninth Circuit's speculation that there might be a *state* right to assert actual innocence does not lend support to the creation of a *federal* right to discover evidence relating to such a state claim. In fact, to the extent the court relied on the possible existence of a state freestanding actual-innocence claim as the basis for its newly recognized federal discovery right, the court essentially supplanted any state postconviction discovery rules with a federal constitutional standard of disclosure.

This approach is improper for four reasons: (1) it is inconsistent with this Court's refusal to impose federal constitutional requirements on state postconviction proceedings; (2) it improperly divorces procedure from procedural context; (3) it incorrectly applies "meaningful access" principles outside the context of a "meaningful access" claim; and (4) it ignores basic federalism concerns in an area over which this Court has extended enormous deference to the States.

a. The Constitution does not require States to provide postconviction remedies to defendants. *See Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) (holding that States are not required to provide

counsel to prisoners pursuing postconviction relief). In the realm of postconviction relief, "States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Id.* at 559 (rejecting premise that "when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume"). *See also Estelle v. Dorrough*, 420 U.S. 534, 536-37 (1975) ("there is no federal constitutional right to state appellate review of state criminal convictions").

Indeed, this Court has cautioned federal courts against applying a "mother knows best" approach to constitutional adjudication in the area of postconviction relief. *Murray v. Giarratano*, 492 U.S. 1, 11 (1989) (reaffirming *Finley* and holding that States are not required to appoint counsel to represent state death-row prisoners in postconviction proceedings). Recognizing that "meaningful access [to collateral remedies] can be satisfied in various ways," Justice Kennedy, concurring, noted that the broad range of options and their complexity mandates according the States "'wide discretion' to select appropriate solutions. Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures." *Id.* at 14 (Kennedy, J., concurring) (citations omitted).

The Ninth Circuit gave the Alaska courts anything but "wide discretion" in selecting an appropriate solution to the issue of postconviction DNA testing. In effect, the Ninth Circuit created a federal constitutional right to discovery even though the Constitution does not require States to provide any substantive

avenue of relief based on that discovery. The illogic of this approach is obvious.

b. The Ninth Circuit's generic reference to state postconviction remedies also ignores the simple, but apparently overlooked, principle that the process due in any given case depends in large part on the procedural context in which a petitioner asserts his right or interest. "Process is not an end in itself." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). The "constitutional purpose [of process] is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.* Thus, what process is due cannot be assessed outside a particular procedural context. *Cf. Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (holding that parole revocations are not criminal proceedings and, therefore, the full panoply of rights due a defendant in a criminal proceeding does not apply).

This simple principle can be illustrated in this case by comparing the possible forms of state postconviction relief that Osborne might pursue. In Alaska, there are at least three such forms: a civil action filed in state court under Alaska's postconviction-relief statutes, Alaska Stat. 12.72.010 *et seq.*; an administrative petition submitted to the State parole board seeking early release through discretionary parole; and an application for clemency addressed to the governor as authorized by the Alaska Constitution.

Although some basic due process protections may apply to those postconviction judicial and administrative proceedings that a State chooses to provide, *see, e.g., Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974) (prisoners entitled to due process in administrative disciplinary proceedings), no similar protections apply to clemency proceedings. A convicted

defendant has no due-process rights in relation to an executive clemency process other than the right to apply for clemency, in part because clemency decisions have traditionally remained outside the judicial purview. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463-65 (1981).

Indeed, Alaska's governor has unfettered discretion to grant or deny clemency. *See* Alaska Const. art. 3, sec. 21 ("Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves."). This Court has recognized that clemency "is simply a unilateral hope." *Dumschat*, 452 U.S. at 465. Accordingly, whatever residual liberty interest a prisoner serving a validly imposed sentence might possess, that interest will give rise to few or no due-process rights in executive clemency determinations. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-83 (1998) (opinion of Rehnquist, C.J.) (prisoner cannot use residual life interest to insist on procedural safeguards in clemency proceeding); *id.* at 289 ("some *minimal* procedural safeguards apply to clemency proceedings" to guard against arbitrary or random determinations) (O'Connor, J., concurring).

Given the differences in the process due in different procedural contexts, one cannot conclude, as the Ninth Circuit apparently did, that a convicted prisoner's right to evidence is the same regardless of what the prisoner intends to do with that evidence.

c. For similar reasons, any attempt to attach the Ninth Circuit's discovery right to a claim that the State allegedly failed to provide Osborne with meaningful access to state postconviction remedies fails. This case does not challenge the Alaska courts' rejection of Osborne's state postconviction-relief ap-

plication. Rather, this case arises from Osborne's extrajudicial request directly to the District Attorney for access to the evidence.[9] *See* J.A. 36-37. Such a request cannot give rise to the one-size-fits-all federal constitutional right fashioned by the Ninth Circuit.

d. Finally, by creating a stand-alone right to obtain access to evidence separate from the alternatives available under Alaska law, the Ninth Circuit effectively removed from the State—and all other States that have formulated legislative or judicial solutions to the question of postconviction DNA testing—the ability to individually address this question. And the court did so in an area of law in which the States are entitled to enormous deference. Recognizing the States' "considerable expertise in matters of criminal procedure" and centuries-old common-law tradition underlying criminal process, this Court has "'exercis[ed] substantial deference to legislative judgments in this area.'" *Herrera*, 506 U.S. at 407 (quoting *Medina v. California*, 505 U.S. 437, 445-46 (1992)). And just as federal courts may not interfere with pending state criminal prosecutions, *see Younger*, 401 U.S. at 43-45, so too is it inappropriate for them to interfere with a State's decision whether (or not) to revive or reexamine a criminal case after a fair trial resulting in a guilty verdict.

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[9] Even if Osborne were to seek access within the context of a state postconviction-relief action, it would be for Alaska's courts, not the Ninth Circuit, to decide in the first instance what relief he may properly seek and what discovery will be available in support of that relief. The Alaska courts have adopted a procedure defendants may invoke to obtain postconviction access to biological evidence. Pet. App. 111a. Osborne has not challenged the constitutionality of that procedure in this case.

3. In sum, the right of access formulated by the Ninth Circuit is based on the assumed existence of a federal constitutional right to collaterally attack a conviction based solely on actual innocence when in fact no such right has been recognized by this Court or by the Alaska courts. And from that assumption, the Ninth Circuit created a *Brady*-like right that stands alone, disconnected from any ongoing judicial proceeding. In creating out of whole cloth a federal due-process right and allowing Osborne to proceed on such an ephemeral basis, the Ninth Circuit has effectively reopened a state criminal investigation and refused to accord the deference traditionally owed to the States in this area of the law, all of which threatens the States' ability to process postconviction challenges in an orderly fashion.

D. In Creating a Federal Constitutional Right to Reopen A Criminal Investigation, the Ninth Circuit Usurped an Area Uniquely Suited to Legislative Resolution

The Ninth Circuit's ruling potentially has enormous practical consequences for the criminal-justice systems of Alaska and other States. The decision is addressed only to DNA testing, but its rationale is not so easily confined. It may be true that the advances represented by DNA testing "are no ordinary developments, even for science." *Harvey II*, 285 F.3d at 305 (Luttig, J., respecting the denial of rehearing en banc). But DNA testing is not the first time, and no doubt will not be the last time, that forensic science has improved the accuracy of its methods by orders of magnitude. If the Ninth Circuit's reasoning is correct, then any state or federal prisoner would gain a federal constitutional right to reopen his case merely by asserting that new

forensic-science technologies might establish his innocence.

In fact, the Ninth Circuit's decision is not even limited to cases in which the requested scientific testing is materially more advanced than the previously available technology. Rather, as the Fourth Circuit has explained on facts quite similar to these: "Establishing a constitutional due process right . . . to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state." *Harvey*, 278 F.3d at 376. This is not to say that the State's interest in finality should trump all other values. But finality, though "not the sole value in the criminal justice system," should not be "subject to the kind of blunt abrogation that would occur with the recognition of a due process entitlement to post-conviction access to DNA evidence." *Id.*

The issues presented by postconviction requests for DNA involve competing policies—implicating (a) the nature of the particular scientific innovation, (b) the allocation of executive and judicial resources, (c) consideration of victims' interests, and (d) interests of justice—and are thus uniquely suited for legislative resolution. Given these interests, crafting a right by statute is often easier "than to derive [it] through the Constitution, simply because the statute can let the [right's operation] turn on any sort of practical consideration without having to subsume it under a broader principle." *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001).

Thus far, 44 States, the District of Columbia, and the Federal Government have enacted statutory

procedures for postconviction DNA testing.[10] These statutes reflect different but overlapping answers to what Judge Wilkinson has called the "myriad of questions," *Harvey II*, 285 F.3d at 300, raised by recognizing a postconviction right to access DNA evidence.

The Innocence Protection Act (IPA), 18 U.S.C. § 3600, serves as one paradigm. Indeed, several States have used the IPA as a model for their own statutes. *See* Brief for the States of California, Florida, Louisiana, *et al.*, as *Amici Curiae* Supporting Petitioners at 7. (The IPA applies only to prisoners convicted of federal offenses and so has no effect on Osborne.) Relief under the IPA is available only from the court that rendered the judgment of conviction; that court must find that (1) the prisoner has declared his actual innocence, under penalty of perjury, and has identified a defense theory that would establish his actual innocence, (2) the identity of the perpetrator was at issue at trial, (3) the new testing is substantially more probative than earlier testing, and (4) the new testing may produce material evidence that would raise a reasonable probability that the prisoner is actually innocent. 18 U.S.C. § 3600(a). In contrast, the right created by the Ninth Circuit is virtually unrestrained and would thus render unconstitutional or irrelevant many of the statutes that have been adopted by the States (and arguably the IPA), as well as the three-part test adopted by the Alaska Court of Appeals.

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[10] *See* Brief for the States of California, Florida, Louisiana, *et al.*, as *Amici Curiae* Supporting Petitioners at 3 & n.1 (to be filed December __, 2008). In addition, five of the remaining six States, including Alaska, provide similar procedures under case law or court rule. *Id.* at 4 n.2.

This is not the proper mode of constitutional adjudication of novel due-process issues raised by scientific advances. The States "are currently engaged in serious, thoughtful examinations," *Glucksberg*, 521 U.S. at 719, of the postconviction DNA testing issue. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism . . . [allows States to] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). The Ninth Circuit, however, has "short-circuit[ed] legislative activity," *Harvey*, 278 F.3d at 376, through "the conversation-stopping process of constitutionalization," *Harvey II*, 285 F.3d at 30 (Wilkinson, C.J.).

E. Any Federal Due-Process Requirements Applicable to Postconviction Requests for DNA Testing Are More Than Fulfilled in this Case

If this Court were to recognize for the first time a federal substantive right to collaterally assert actual innocence, then procedural due process might require that a prisoner asserting such a claim have access to evidence needed to support that claim. But the mere recognition of a procedural due process right is not the end of the inquiry. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance[.]" *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotation omitted). In the face of claims of actual innocence, this Court has always attended to the need "to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324; *see*

also Herrera, 506 U.S. at 399 ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminating the possibility of convicting an innocent person.") (quotation omitted).

In the context of a due-process right of access that might be recognized by this Court, the IPA again serves as a paradigm for the imposition of reasonable limits on that right. Reasonable limitations will ensure an appropriate balance between state interests of finality, comity, and appropriate use of resources and the prisoner's interest in justice.

Foremost among these limits are requirements that a prisoner formally declare his innocence and that he establish the materiality of new DNA testing. *E.g.*, 18 U.S.C. § 3600(a)(1), (6)-(8). Even former Judge Luttig, on whose opinion the Ninth Circuit below purported to rely, would restrict any due-process right to postconviction DNA testing to only those who have "steadfastly maintain[ed]" and "persist[ed] in" their "absolute," "factual" innocence. *Harvey II*, 285 F.3d at 318, 319 (Luttig, J.). And a materiality requirement ensures against requests for postconviction testing in the absence of any reason beyond rank speculation to believe that the test might exculpate the prisoner.

In this case, Osborne cannot meet either of these limitations. Instead of declaring his actual innocence, he has confessed, in graphic detail, to the precise crimes with which he was charged and convicted. Pet. App. 71a & n.11. *See Grayson*, 460 F.3d at 1338-39 (prisoner was not entitled to postconviction DNA testing in light of his failure to declare actual innocence, his confession, and incriminating testimony at fair trial). *See also* J.A. 226-27

(Osborne's affidavit asserting that new DNA tests will "prove . . . either [his] guilt or innocence").

Osborne also cannot make the materiality showing that would be required under the IPA. Jackson said that Osborne was his passenger and participated with him in the rape and assault on K.G.[11] The DQ-alpha testing actually performed on the condom implicated Osborne to about an 83 percent confidence level. And of course, the circumstantial evidence—including Osborne's telephone calls to Jackson from the arcade, the arcade tickets found in Jackson's car, the reports of Osborne being with Jackson both before and (with blood on his clothes) after the assault, and the axe handle found in Osborne's room—all convincingly establishes his guilt. Never in this case's long history has Osborne offered a persuasive alternative explanation for these coincidences. In such circumstances, postconviction DNA testing is not material. *See Grayson*, 460 F.3d at 1339 ("[T]he DNA testing that Grayson seeks to perform could not show that he is actually innocent of the capital murder.").

Osborne, in short, fails to satisfy the two core criteria weighed by the many judges and legislators who have considered how far a right to postconviction DNA testing should extend. Meanwhile, the Alaska courts have already rejected Osborne's demand, but not before giving due consideration to those criteria.

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[11] Jackson's confession was not admissible at trial, but "the rules of admissibility that would govern at trial" do not apply to an actual-innocence inquiry. "Instead the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995); *see also House v. Bell*, 547 U.S. 518, 538 (2006).

If a federal constitutional right to postconviction DNA testing can ever exist, it does not in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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18 U.S.C. § 3600(a) provides:

> **In General.—** Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the "applicant"), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply:
>
> (1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent of—
>
> (A) the Federal offense for which the applicant is under a sentence of imprisonment or death; or
>
> (B) another Federal or State offense, if—
>
> (i) evidence of such offense was admitted during a Federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or new sentencing hearing; and
>
> (ii) in the case of a State offense—
>
> (I) the applicant demonstrates that there is no adequate remedy under State law to permit DNA testing of the specified evidence relating to the State offense; and
>
> (II) to the extent available, the applicant has exhausted all remedies available under State law for requesting

DNA testing of specified evidence relating to the State offense.

(2) The specific evidence to be tested was secured in relation to the investigation or prosecution of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

(3) The specific evidence to be tested—

(A) was not previously subjected to DNA testing and the applicant did not—

(i) knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of the Innocence Protection Act of 2004; or

(ii) knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing; or

(B) was previously subjected to DNA testing and the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing.

(4) The specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.

(5) The proposed DNA testing is reasonable in scope, uses scientifically sound methods,

and is consistent with accepted forensic practices.

(6) The applicant identifies a theory of defense that—

(A) is not inconsistent with an affirmative defense presented at trial; and

(B) would establish the actual innocence of the applicant of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

(7) If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial.

(8) The proposed DNA testing of the specific evidence may produce new material evidence that would—

(A) support the theory of defense referenced in paragraph (6); and

(B) raise a reasonable probability that the applicant did not commit the offense.

(9) The applicant certifies that the applicant will provide a DNA sample for purposes of comparison.

(10) The motion is made in a timely fashion, subject to the following conditions:

(A) There shall be a rebuttable presumption of timeliness if the motion is made within 60 months of enactment of the Justice For All Act of 2004 or within 36 months of conviction, whichever comes later. Such presumption may be rebutted upon a showing—

(i) that the applicant's motion for a DNA test is based solely upon information used in a previously denied motion; or

(ii) of clear and convincing evidence that the applicant's filing is done solely to cause delay or harass.

(B) There shall be a rebuttable presumption against timeliness for any motion not satisfying subparagraph (A) above. Such presumption may be rebutted upon the court's finding—

(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant's motion for a DNA test;

(ii) the evidence to be tested is newly discovered DNA evidence;

(iii) that the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or

(iv) upon good cause shown.

(C) For purposes of this paragraph—

(i) the term "incompetence" has the meaning as defined in section 4241 of title 18, United States Code;

(ii) the term "manifest" means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident.

28 U.S.C. § 2254 provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)
>
> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)
>
> (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> . . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 12 provides in part:

> (b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive plead-

ing thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

. . . .

(h) Waiver or Reservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or

(B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Federal of Civil Procedure 26(b)(b) provides in part:

(b) *Discovery Scope And Limits.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In *General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the

> discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

Rule 6(a) of the Rules Governing Section 2254, foll. 28 U.S.C. § 2254, provides in pertinent part:

> A judge may, for good cause shown, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.

Alaska Constitution, art. 3, sec. 21 provides:

> Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures. This power shall not extend to impeachment. A parole system shall be provided by law.

Alaska Statute 12.72.010 provides:

> A person who has been convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims
>
> (1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
>
> (2) that the court was without jurisdiction to impose sentence;
>
> (3) that a prior conviction has been set aside and the prior conviction was used as a statutorily required enhancement of the sentence imposed;
>
> (4) that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice;

(5) that the person's sentence has expired, or the person's probation, parole, or conditional release has been unlawfully revoked, or the person is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error previously available under the common law, statutory law, or other writ, motion, petition, proceeding, or remedy;

(7) that

(8) there has been a significant change in law whether substantive or procedural, applied in the process leading to the person's conviction or sentence;

(B) the change in the law was not reasonably foreseeable by a judge or competent attorney;

(C) it is appropriate to retroactively apply the change in law because the change requires observance of procedures without which the likelihood of an accurate conviction is seriously diminished;

(D) the failure to retroactively apply the chance in law would result in a fundamental miscarriage of justice, which is established by demonstration that, had the changed law been in effect at the time of the applicant's trial, a reasonable trier of fact would have a reasonable doubt as to the guilty of the applicant;

(8) that after the imposition of sentence, the applicant seeks to withdraw a plea of guilty or nolo contendere in order to correct manifest

injustice under the Alaska Rules of Criminal Procedure; or

(9) that the applicant was not afforded effective assistance of counsel at trial or on direct appeal

Alaska Statute 12.72.020 (2005) provided in part:

(a) A claim may not be brought under AS 12.72.010 or the Alaska Rules of Criminal Procedure if

. . . .

(3) the later of the following dates has passed, except that if the applicant claims that the sentence was illegal there is no time limit on the claim:

(A) if the claim relates to a conviction, two years after the entry of the judgment of the conviction or, if the conviction was appealed, one year after the court's decision is final under the Alaska Rules of Appellate Procedure[.]

. . . .

(b) Notwithstanding (a)(3) and (4) of this section, a court may hear a claim

. . . .

(2) based on newly discovered evidence if the applicant establishes due diligence in presenting the claim and sets out facts supported by evidence that is admissible and

(A) was not known within

(i) two years after entry of the judgment of conviction if the claim relates to a conviction;

(ii) two years after entry of a court order revoking probation if the claim relates to a court's revocation of probation;

. . . .

(B) is not cumulative to the evidence presented at trial;

(C) is not impeachment evidence; and

(D) establishes by clear and convincing evidence that the applicant is innocent.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
JAN 28 2009
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No. 08-6

In the Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL., PETITIONERS

v.

WILLIAM G. OSBORNE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state prisoner's claim that he is entitled to obtain postconviction access to evidence for DNA testing may be brought in an action under 42 U.S.C. 1983.

2. Whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to obtain postconviction access to evidence for previously unavailable DNA testing at his own expense, where the State has provided no statutory mechanism for access, articulates no justification for its refusal to permit access, and concedes that a favorable test result would conclusively establish the prisoner's innocence.

PARTIES TO THE PROCEEDING

Petitioners are the District Attorney's Office for the Third Judicial District of Alaska and Adrienne Bachman, District Attorney for the Third Judicial District of Alaska. Respondent is William G. Osborne.

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In the Supreme Court of the United States

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DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL., PETITIONERS

v.

WILLIAM G. OSBORNE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 521 F.3d 1118. An earlier opinion of the court of appeals (Pet. App. 51a-62a) is reported at 423 F.3d 1050. The order of the district court (Pet. App. 46a-50a) is reported at 445 F. Supp. 2d 1079.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2008. The petition for a writ of certiorari was filed on June 27, 2008, and granted on November 3, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

Title 42, Section 1983, of the United States Code is reproduced at Pet. Br. 7a.

STATEMENT

Respondent, a state prisoner, filed an action in federal district court against petitioners pursuant to 42 U.S.C. 1983, contending that, under the Due Process Clause of the Fourteenth Amendment, he was entitled to obtain postconviction access to evidence for DNA testing, at his own expense, in order to establish his innocence of the crime for which he had been convicted. The district court initially dismissed the complaint, J.A. 2, 199-209, but the court of appeals reversed, holding that respondent's claim was cognizable in an action under Section 1983, Pet. App. 51a-62a. The district court then granted summary judgment to respondent on the merits of his due process claim, *id.* at 46a-50a, and the court of appeals affirmed, *id.* at 1a-45a. It held that, "under the unique and specific facts of this case and assuming the availability of the evidence in question, [respondent] has a limited due process right of access to the evidence for purposes of post-conviction DNA testing." *Id.* at 2a. Since the court of appeals' decision, petitioners have conceded that a favorable DNA test result "would conclusively establish [respondent's] innocence." Cert. Reply Br. 8.

A. Background

1. DNA testing has aptly been described as "nothing less than "the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent." Statement of Attorney General John Ashcroft Concerning the DNA Initiative (Mar. 4, 2002) <tinyurl.com/ashcroftdna>. It is now universally recognized that DNA testing is "the foremost forensic technique for identifying perpetrators, and eliminating suspects, when biological material such as saliva, skin, blood, hair, or semen [is] left at a crime scene." Department of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 1 (1999) (*Postconviction DNA Testing*).

Perhaps the most important application of DNA testing has been to identify individuals who have been wrongfully convicted. Postconviction DNA testing has exonerated at least 227 individuals, 17 of whom had been sentenced to death. Notably, that group includes numerous individuals who were convicted on the basis of what had appeared at the time to be powerful evidence of guilt, including multiple eyewitness identifications, other forensic evidence, and their own confessions; it even includes 12 individuals who pleaded guilty. See Edward Connors et al., Department of Justice, *Convicted by Juries, Exonerated by Science* 15-18 (1996); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004); Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76-92 (2008) (*Judging Innocence*); Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 5 Science 892, 893-895 (2005); The Innocence Project,

When the Innocent Plead Guilty <www.innocence-project.org/guiltyplea>.

Although the first exoneration through DNA testing occurred twenty years ago, most exonerations have occurred in the last decade, with the advent of Short Tandem Repeat (STR) testing. That method "increas[ed] exponentially the reliability of forensic identification over earlier techniques" and was "qualitatively different from all that proceeded it." *Harvey* v. *Horan*, 285 F.3d 298, 305 & n.1 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc). The advantages of STR testing are twofold. First, STR testing can generate results even from miniscule and highly degraded samples of DNA. Second, STR testing can generate a profile that is effectively unique among the world's population; for example, the odds that two unrelated white Americans would share the same STR profile are estimated at one in *575 trillion*. See Department of Justice, *Future of Forensic DNA Testing* 19 (2000); John M. Butler, *Forensic DNA Typing* 12, 146 (2005) (Butler).

By contrast, the two previously favored methods of DNA testing, DQ-Alpha and RFLP, suffered from serious deficiencies. While DQ-Alpha testing could be used on small samples, it could not effectively discriminate between different individuals, with the result that DQ-Alpha testing was little more probative than conventional blood-group matching. And while RFLP testing could generate statistically rarer profiles, it required a large quantity of non-degraded DNA, and the interpretation process was potentially subjective and error-prone. See *Postconviction DNA Testing* 27; Butler 146; William Thompson, *Subjective Interpretation, Laboratory Error and the Value of DNA Evidence*, 96 Genetica 153 (1995).

The advent of STR testing has enabled not only the exoneration of individuals who have been wrongfully convicted of crimes, but also, in many cases, the identification of the true perpetrators of those crimes. Both of those tasks have been facilitated by the Combined DNA Index System (CODIS), a database operated by the Federal Bureau of Investigation (FBI) that enables federal and state law-enforcement officers to compare profiles from STR DNA testing against those of more than 6 million convicted felons nationwide. Since its inception, CODIS has generated more than 77,000 "hits" in both active and "cold case" investigations. In fact, in at least 98 cases in which postconviction DNA testing has exonerated a wrongfully convicted individual, the true perpetrator has been identified—in 59 of those cases, by means of a DNA database "hit." See FBI, CODIS-NDIS Statistics <tinyurl.com/fbicodis>; Brandon L. Garrett, *Judging Innocence: An Update* <tinyurl.com/garrett-2009> (*Judging Innocence Update*).

2. The remarkable advances represented by DNA testing in general and STR testing in particular—"which have rendered it literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases"—are "no ordinary developments, even for science." *Harvey*, 285 F.3d at 305 (opinion of Luttig, J.). To its credit, the American legal system has, for the most part, responded appropriately to those watershed scientific developments. As of the time of this filing, 44 States and the federal government have enacted DNA testing statutes, all but two of them in the last ten years; indeed, one of those States, South Carolina, did so after the filing of the petition for certiorari in this case. See S.C. Code Ann. § 17-28-10; Br. in Opp. 8

n.4 (listing other statutes). With rare exceptions,[1] those statutes provide broad rights to testing. For example, the federal statute (like most of the state statutes) provides for testing where the applicant can show that the results of DNA testing, if favorable, would "raise a reasonable probability" of innocence. 18 U.S.C. 3600(a)(8)(B); see, *e.g.*, Ark. Code Ann. § 116-112-202(8); Mo. Rev. Stat. § 547.035(7)(1).[2] In recent years, moreover, the federal government has appropriated approximately $100 million annually in grants to States for DNA testing—nearly ten times as much as for all other forensic programs combined. See Nathan James, Congressional Research Service, *An Overview and Funding History of Select Department of Justice Grant Programs* 11, 15 (2006).

Alaska, where this case arises, stands as a stark exception. Although Alaska (like every other State in the Nation) provides mechanisms through which convicted individuals can obtain relief from their convictions based on new evidence of innocence, Alaska is one of the six

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[1] Two States provide for testing only for prisoners sentenced to death. See Ky. Rev. Stat. Ann. § 422.285(1); Nev. Rev. Stat. Ann. § 176.0918(1). In addition, five other State statutes exclude, or have been construed to exclude, testing for prisoners who pleaded guilty or no contest. See Mich. Comp. Laws § 770.16(3)(b); Ohio Rev. Code Ann. § 2953.72(C)(1)(a); *People* v. *O'Connell*, 879 N.E.2d 315, 319 (Ill. 2007); *People* v. *Byrdsong*, 820 N.Y.S.2d 296, 299 (N.Y. App. Div. 2006); *Williams* v. *Erie County Dist. Att'y's Office*, 848 A.2d 967, 972 (Pa. Super. 2004).

[2] Where convicted individuals have been unable to obtain DNA testing through testing statutes (either because they did not qualify for relief under those statutes or because the jurisdiction in question lacked such a statute altogether), they have frequently been able to do so by consent. See *Judging Innocence Update* (noting that prosecutors had consented to DNA testing in 82% of cases resulting in exonerations).

States that provides no statutory mechanism for obtaining DNA testing. As far as we are aware, moreover, it is the only one of those States that has not conducted a single postconviction DNA test pursuant to court order or consent.

B. Facts and Proceedings Below

1. This case concerns the identity of one of the perpetrators of a brutal crime. While the perpetrator's identity is disputed, the basic facts of the crime are not. On the evening of March 22, 1993, Dexter Jackson and another individual, both black men, solicited sex from a white prostitute, K.G., in Anchorage, Alaska. When K.G. agreed and got into Jackson's car, the two men drove her to a secluded location, threatened her at gunpoint, and robbed her. K.G. was then forced to perform a sexual act on Jackson while she was vaginally raped by the second perpetrator, who used a blue condom taken from K.G. When K.G. attempted to flee, the men caught her and beat her severely. One of the men (believed by K.G. to be the second perpetrator) then shot at her, grazing her head. The men buried K.G. in the snow and left her for dead. See Pet. App. 113a-115a.

A few days later, police stopped Jackson's car for a traffic violation and, in the course of that stop, discovered a gun, along with a pocket knife belonging to K.G. Jackson was arrested; police found blood in the car that was consistent with K.G.'s. Police later matched ammunition found at the crime scene to the gun from Jackson's car and matched tracks found at the scene to his tires. After Jackson was arrested, he confessed and implicated respondent—a member of the military with no criminal record—as the second perpetrator. See J.A. 28; Pet. App. 116a-117a.

2. Respondent was charged in Alaska Superior Court with two counts of attempted first-degree murder, two counts of first-degree sexual assault, and one count each of kidnapping, sexual assault, and first-degree assault; Jackson was charged with similar offenses, and the two men were tried jointly before a jury.

At trial, K.G. identified respondent as the second perpetrator. Her initial identification of respondent, however, had been more equivocal. In her report to the police, K.G. had described the second perpetrator as 25-30 years old, 6 feet tall, weighing 180-190 pounds, and clean-shaven. Pet. App. 7a; J.A. 81, 216. Respondent, however, was actually 21 years old and 5'9" tall, weighed 155 pounds, and had a mustache. J.A. 167. And when K.G. had been presented with a photographic lineup, she described respondent only as the "most familiar" and "most likely" suspect in the lineup. Pet. App. 4a. In addition, K.G. had extremely impaired vision and had not been wearing glasses or contact lenses on the night of the crime. J.A. 168.

The State also relied heavily on the results of testing on a blue condom recovered from the scene. The State conducted DQ-Alpha testing on fluids from the condom, which yielded a DNA profile consistent with respondent's. That profile, however, was shared by 14.7% to 16% of all African Americans, which, the State's expert admitted, only made respondent a "possible source" of the fluids. J.A. 117-119. The State's expert considered conducting RFLP testing, which would have been more discriminating, but concluded that such testing would not be feasible due to the "degraded" condition of the sample. J.A. 217. The State nevertheless repeatedly argued to the jury, without qualification, that Osborne's semen

was found on the condom. See J.A. 121, 123, 124, 127, 130.[3]

When defense counsel learned of the DQ-Alpha testing results, she informed respondent that it was her opinion that he would be in a "strategically better position without [RFLP] DNA testing," on the ground that such testing might inculpate him more conclusively. Pet. App. 98a. Respondent repeatedly asked counsel to pursue further testing on the ground that the results would establish his innocence; he also wrote to an out-of-state DNA expert for assistance. J.A. 162-163, 186, 226. Under state law, however, the ultimate decision whether to pursue RFLP testing was left to counsel, and she did not do so. Pet. App. 101a-102a.

At trial, respondent contended that he was misidentified as the second perpetrator; in addition, he contended that, although he was with Jackson later on the evening of the crime, he had an alibi during the events in question, because he was documented on videotape to have been at a local arcade well after K.G. reported that she had been picked up by the two men. J.A. 165. The jury found respondent guilty of the two counts of first-degree sexual assault and the counts of kidnapping and sexual assault, and not guilty of the remaining counts. He was

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[3] The prosecution also relied on the results of a microscopic examination of hairs found on the condom and on K.G.'s sweater, which the State's expert testified exhibited "the same characteristics" as respondent's own. Pet. App. 117a. At the time of trial, DNA analysis of the hairs was not possible; today, microscopic analysis, standing alone, is no longer accepted as a valid basis for identification. See, *e.g.*, Jason C. Kolowski et al., *A Comparison Study of Hair Examination Methodologies*, 49 J. Forensic Sci. 1253, 1254-1255 (2002). The State repeatedly argued to the jury that Osborne's hair was found at the scene. See J.A. 123, 124, 127, 130.

sentenced to 26 years of imprisonment, with five years suspended. Pet. App. 117a-118a.

3. Respondent appealed, contending, *inter alia*, that there was insufficient evidence to support K.G.'s identification of him as the second perpetrator. The Alaska Court of Appeals affirmed, Pet. App. 113a-130a, and the Alaska Supreme Court denied review, see *Osborne* v. *State*, No. S-7549 (Sept. 3, 1996).

4. a. Respondent then filed an application for post-conviction relief in Alaska Superior Court. The trial court denied the application. J.A. 14-22. The trial court rejected respondent's contention that defense counsel had provided ineffective assistance by failing to pursue further DNA testing, J.A. 20, and also denied respondent's request to obtain testing of the condom using the STR method, J.A. 22.

b. The Alaska Court of Appeals affirmed in part and remanded. Pet. App. 91a-112a. As is relevant here, the appellate court held that respondent had no federal due process right to obtain testing using the STR method. *Id.* at 105a-109a. The court suggested, however, that a convicted individual might be entitled to testing under the Alaska Constitution if he could show "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning [the individual's] identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." *Id.* at 111a.

c. On remand, the Alaska Superior Court determined that respondent could not satisfy any of the three components of the appellate court's proposed test. J.A. 213-222.

d. The Alaska Court of Appeals affirmed. Pet. App. 63a-90a. It agreed with the trial court that respondent

could not satisfy any of the three components of its proposed test. *Id.* at 75a-82a.

Judge Mannheimer, joined by Chief Judge Coats (the author of the majority opinion), concurred. Pet. App. 82a-90a. He suggested that "the due process clause of the Alaska Constitution might require us to intervene in cases where a defendant presents clear genetic evidence of [his] innocence," *id.* at 89a, but agreed that respondent was not entitled to DNA testing in the first place because a favorable DNA test result "[w]ould not *conclusively* establish [his] innocence," *id.* at 90a (emphasis added).

e. The Alaska Supreme Court denied review. See *Osborne* v. *State*, No. S-12799 (Jan. 22, 2008).

5. a. After his state postconviction application was initially denied, respondent filed an action in federal district court against petitioners and others pursuant to 42 U.S.C. 1983. J.A. 23-40. As is relevant here, respondent challenged petitioners' refusal to permit him to have access to the condom for STR testing for the purpose of proving that he was innocent of the crime for which he had been convicted. J.A. 36-37, 39.[4] He alleged that, "[b]y refusing to release * * * biological evidence for DNA testing, and thereby preventing [respondent] from gaining access to evidence which could exonerate him as the perpetrator, [petitioners] have deprived [respondent] of access to exculpatory evidence," in violation of the Due Process Clause of the Fourteenth Amendment. J.A. 37.

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[4] Respondent sought access not only to the condom itself, but also to the hairs found on the condom and on K.G.'s sweater. J.A. 33-35. Respondent sought to subject the hairs to mitochondrial testing, which permits analysis of DNA found in hair shafts (as opposed to roots or follicles). See *ibid.* All of the same arguments that support access to the condom for STR testing support access to the hairs for mitochondrial testing as well.

He also contended that the results of any subsequent STR testing could be run through CODIS (which, like STR testing itself, did not exist at the time of his trial) and used to identify the true perpetrator of the offense. See J.A. 25.

Petitioners moved to dismiss the complaint on the ground that respondent's claim was not cognizable in a Section 1983 action. A magistrate judge recommended granting the motion, J.A. 199-209, and the district court did so, J.A. 2.

b. The court of appeals reversed. Pet. App. 51a-62a. The court of appeals explained that this Court's cases make clear that a Section 1983 action brought by a state prisoner is barred "if success in that action would *necessarily* demonstrate the invalidity of confinement or its duration." *Id.* at 56a (emphasis altered) (quoting *Wilkinson* v. *Dotson*, 544 U.S. 74, 81-82 (2005)). Applying that standard, the court reasoned that "[i]t is clear to us, as a matter of logic, that success in such an action would not necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 58a-59a (internal quotation marks omitted). The court noted that "success would yield only *access* to the evidence—nothing more." *Id.* at 59a. Moreover, the court explained, "even if the results exonerate [respondent], a separate action * * * would be required to overturn his conviction." *Ibid.*

c. On remand, the district court granted summary judgment to respondent. Pet. App. 46a-50a. The court held that "there does exist, under the unique and specific facts presented, a very limited constitutional right to the testing sought." *Id.* at 49a (emphasis omitted). The court found "particularly persuasive" Judge Luttig's opinion in *Harvey*, which had concluded that "there is a limited, constitutional post-conviction right of access to previously-produced forensic evidence for the purpose of

STR and related DNA testing." *Id.* at 49a n.12 (quoting 285 F.3d at 325).

d. The court of appeals affirmed. Pet. App. 1a-45a.

At the outset, the court of appeals reasoned that this case was "controll[ed]" by its earlier decision in *Thomas* v. *Goldsmith*, 979 F.2d 746 (9th Cir. 1992), in which the court had held that a prisoner had a right to obtain post-conviction access to evidence for DNA testing where the results of testing could be material to a "gateway" claim of actual innocence. Pet. App. 15a. The court noted that *Thomas*, in turn, had relied on *Brady* v. *Maryland*, 373 U.S. 83 (1963), which first recognized the principle that the government is obligated to turn over material exculpatory evidence to the defense before trial. Pet. App. 15a. At the same time, the court noted that "courts recognizing a post-conviction right [of access] have done so not necessarily based on *Brady* itself but based on the due process principles that motivated *Brady*, including fundamental fairness [and] the prosecutor's obligation to do justice rather than simply obtain convictions." *Id.* at 22a-23a.

The court of appeals next rejected petitioners' contention that, "before [the State] is obligated to disclose any evidence post-conviction, [respondent] should be required to satisfy the extraordinarily high standard of proof that applies to freestanding claims of actual innocence." Pet. App. 23a-24a. The court explained that "[t]he fundamental flaw in the State's position is that it effectively equates [respondent's] access-to-evidence claim with a habeas [actual-innocence] claim." *Ibid.* The court ultimately concluded that, because "[respondent's] case for disclosure is so strong on the facts," it would "leave to another day" the exact formulation of the standard for when a prisoner is entitled to obtain postconviction access to evidence for DNA testing. *Id.* at 27a. The

court held, however, that "the standard * * * applicable to [respondent's] claim for post-conviction access to evidence is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed to [respondent], he could prevail in an action for post-conviction relief." *Id.* at 28a.[5]

Applying its standard, the court of appeals rejected petitioners' contention that, even if the results of DNA testing were favorable, those results "would not cast sufficient doubt on [respondent's] conviction to require disclosure of that evidence." Pet. App. 32a. The court explained that "[petitioners'] proposed hypotheticals for reconciling exculpatory DNA tests with [respondent's] guilt are so inconsistent with and improbable in light of the evidence in the trial record that they cannot negate the materiality of further DNA testing to possible post-conviction relief." *Id.* at 39a.[6]

The court of appeals also rejected petitioners' contention that the granting of postconviction access to evi-

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[5] The court of appeals declined to give preclusive effect to the state courts' findings in the state postconviction proceedings. Pet. App. 28a-32a. Specifically, the court reasoned that the finding that a favorable DNA test result would not be conclusive was not entitled to preclusive effect "because it was made in conformity with a materiality standard under state law that is more stringent than any standard this court would apply under federal law." *Id.* at 30a.

[6] The court of appeals also determined that respondent's subsequent statements to a parole board that he had participated in the rape did not necessarily foreclose his right to obtain access to evidence for DNA testing. Pet. App. 40a-42a. The court noted the possibility that, "as [respondent] now claims, he was motivated to confess falsely as the most expeditious means available to obtain release from prison," *id.* at 41a, and also noted that petitioners' proposed rule "would ignore the emerging reality of wrongful convictions based on false confessions and the capability of DNA testing to reveal the objective truth and exonerate the innocent," *ibid.*

dence for DNA testing would be "inherent[ly]" prejudicial on the ground that it "erodes the important value of finality in the criminal justice system." Pet. App. 42a. The court reasoned that "[t]he evidence in question can be produced easily and without cost to the State and, if favorable to [respondent], would be strong evidence in support of post-conviction relief." *Ibid.* The court discounted petitioners' contention that there was "strong evidence" of respondent's guilt, noting that "recent history has shown" that "DNA evidence has the capability of refuting otherwise irrefutable inculpatory evidence." *Id.* at 43a. The court reasoned that, if DNA testing in this case is inculpatory, "the State will have lost nothing; indeed, it will gain even more definitive proof of [respondent's] guilt and will be relieved of the burden of further post-conviction litigation." *Ibid.* On the other hand, if DNA testing is exculpatory, "[respondent] will obviously gain a great deal, as will the State, whose paramount interests are in seeking justice [and] not obtaining convictions at all costs." *Ibid.* In either case, the court concluded, "the truth-seeking function of the criminal justice system is furthered." *Ibid.*

The court of appeals therefore held that "[respondent's] right to due process of law prohibits the State from denying him reasonable access to biological evidence for the purpose of further DNA testing" where (1) "that biological evidence was used to secure his conviction"; (2) "the DNA testing is to be conducted using methods that were unavailable at the time of trial and are far more precise than the methods that were then available"; (3) "such methods are capable of conclusively determining whether [respondent] is the source of the generic material"; and (4) "the evidence is material to available forms of post-conviction relief." Pet. App. 44a.

e. Petitioners then sought review in this Court. At the certiorari stage, petitioners conceded, for the first time in this litigation, that a favorable DNA test result "would conclusively establish [respondent's] innocence." Reply Br. 8.

SUMMARY OF ARGUMENT

This case provides the Court with its first opportunity to consider the application of the requirements of due process to arguably the most important development in the history of forensic science: the advent of DNA testing, which in its current form has the potential to establish beyond a shadow of doubt that an individual convicted of a crime is in fact innocent. For over a decade, petitioners have denied respondent any opportunity to access the evidence used against him at trial to conduct DNA testing at his own expense, even though they now concede that a favorable test result would conclusively establish his innocence. In so doing, petitioners do not contend that favorable test results would be of no consequence—nor could they, in light of the fact that Alaska, like every other State, provides mechanisms through which prisoners can obtain relief from their convictions based on new evidence of innocence. Petitioners nevertheless fail to offer any valid justification for their failure to permit access. In the face of petitioners' stubborn refusal to permit access to the evidence, the court of appeals correctly held, first, that respondent's claim for access to the evidence may be brought in an action under 42 U.S.C. 1983, and second, that petitioners' conduct offends due process.

I. Respondent's access-to-evidence claim may be brought in a Section 1983 action. In a series of cases starting with *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), this Court has held that a narrow category of claims that

otherwise fall within the scope of Section 1983 are nevertheless cognizable only under the habeas statute. Specifically, the Court has held that a Section 1983 action would be barred where a judgment in a prisoner's favor would necessarily imply the invalidity of his conviction or sentence. That is plainly not the case here. Success on an access-to-evidence claim means only that a prisoner gets access to evidence for DNA testing; the prisoner will be able to obtain relief from his conviction only if the resulting DNA testing is exculpatory and he is able to prevail in any subsequent application for postconviction relief. Nor is an access-to-evidence claim inherently antecedent to an actual-innocence claim that would be brought in a subsequent federal habeas petition, as petitioners contend, because a prisoner could (and likely would) pursue other remedies upon obtaining a favorable DNA test result.

II. A. Petitioners' conduct constitutes a breach of procedural due process. Even after his conviction, respondent retains a liberty interest in meaningful access to any mechanisms for postconviction relief that the State chooses to provide. In this case, respondent could seek postconviction relief on the basis of actual innocence by means of either an application in state court or a petition for clemency. In light of respondent's liberty interest in meaningful access to those mechanisms, he is entitled to obtain access to the evidence under the familiar balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Respondent's interest in the accuracy of his conviction is undeniably compelling, and the State has articulated no valid countervailing interest for its refusal to permit access to the evidence for potentially exculpatory DNA testing at respondent's own expense. The result would be no different, moreover, even under the narrower test of *Medina* v. *California*, 505 U.S. 437 (1992).

And this Court's cases concerning access to evidence at trial, which are founded on the truth-seeking function of the criminal justice system, further support the conclusion that procedural due process requires the State to permit access to the evidence here.

B. Because it rises to the level of conscience-shocking behavior, petitioners' refusal to permit access to the evidence also constitutes a breach of substantive due process. The State has offered no legitimate explanation for its refusal to grant access to the evidence, and that refusal is thus arbitrary—indeed, shockingly so, in light of the conceded potential of that evidence to clear respondent completely of the crime with which he was charged. Because Alaska stands alone in refusing to enable *any* postconviction DNA testing, this case is the polar opposite of *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), in which the Court refused to recognize a substantive due process right that would have upended the longstanding practices of the vast majority of the States. Under this Court's due process jurisprudence, respondent should be afforded the opportunity, at no cost to the State, to engage in testing that could conclusively establish his innocence.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S ACCESS-TO-EVIDENCE CLAIM MAY BE BROUGHT IN AN ACTION UNDER 42 U.S.C. 1983

Petitioners contend (Br. 18-35) that respondent's access-to-evidence claim may not be brought in an action under the federal civil-rights statute, 42 U.S.C. 1983.[7]

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[7] Neither the amici States nor the United States joins in that contention. The latter omission is particularly notable, because the United States participated as amicus curiae in *Hill* v. *McDonough*,

That contention lacks merit. Under this Court's precedents concerning the interplay between Section 1983 and the federal habeas statute, 28 U.S.C. 2254, it is "not * * * even arguable," as petitioners suggest, that respondent is foreclosed from bringing his access-to-evidence claim in a Section 1983 action. *Harvey*, 285 F.3d at 308 (opinion of Luttig, J.). Like most of the lower courts to have considered the issue, the court of appeals therefore correctly held that respondent's claim was cognizable under Section 1983.

A. Under This Court's Precedents, Respondent's Claim May Be Brought Under Section 1983

1. The federal civil-rights statute, 42 U.S.C. 1983, provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," and specifically provides for the availability of equitable relief, as well as damages. As a preliminary matter, it is clear that respondent's claim falls within the plain terms of Section 1983, and petitioners do not contend otherwise. In the complaint in this case, re-

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547 U.S. 573 (2006), this Court's most recent case concerning the interplay between Section 1983 and the federal habeas statute. In that case, the United States unsuccessfully argued that a state prisoner's claim that the method to be used in carrying out his execution violates the Eighth Amendment must be brought in a habeas petition. See U.S. Br. at 9-30, *Hill*, *supra* (No. 05-8794). Critically, the United States contended that it had a "substantial interest" in the resolution of that question, on the ground that the Court's decision "will likely resolve the closely related question whether a federal prisoner * * * must bring a method-of-execution claim in a motion * * * under 28 U.S.C. 2255 (the analogue to a petition for habeas corpus by a state prisoner under 28 U.S.C. 2254)." *Id.* at 2. Although the United States presumably has an identical interest in the corresponding issue in this case, it has chosen not to address that issue in its brief.

spondent contended that he had a right to obtain access to evidence for DNA testing under the Due Process Clause of the Fourteenth Amendment, see J.A. 37, and asked the district court to enter an injunction directing petitioners to permit such access, see J.A. 39.

In a series of cases starting with *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), this Court has held that there is a narrow class of claims that fall within the broad scope of Section 1983 but are nevertheless cognizable only under the habeas statute. In *Preiser* itself, the Court indicated that a prisoner would be barred from bringing a Section 1983 action where the claim at issue was at "the core of habeas corpus." *Id.* at 489. Where the habeas statute "so clearly applies," the Court reasoned, it "must be understood to be the exclusive remedy available." *Ibid.* And in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), the Court elaborated on that principle by explaining that a Section 1983 action would be barred where "a judgment in favor of the [prisoner] would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487; see *Nelson* v. *Campbell*, 541 U.S. 637, 647 (2004) (stating that "we were careful in *Heck* to stress the importance of the term 'necessarily'"); *Harvey*, 285 F.3d at 309 (opinion of Luttig, J.) (noting that this Court "snugly drew the fault line to the *necessity* that the success of the 1983 action depend upon proof that the underlying conviction is invalid if it is to be foreclosed").[8]

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[8] Although the Court initially applied the rule of *Heck* where a prisoner was seeking damages, it has since indicated that the same rule would apply where the prisoner was seeking injunctive relief. See *Wilkinson* v. *Dotson*, 544 U.S. 74, 82 (2005); *Edwards* v. *Balisok*, 520 U.S. 641, 648 (1997).

2. The court of appeals correctly held that respondent's access-to-evidence claim is not barred by *Heck* and its progeny because, "as a matter of logic," success on such a claim would not necessarily imply the invalidity of respondent's confinement. Pet. App. 58a-59a. Success on an access-to-evidence claim means only that a prisoner gets access to evidence for DNA testing; the release of the evidence terminates the proceeding. Even if the resulting DNA testing is exculpatory, therefore, the prisoner would still have to "initiate an entirely separate lawsuit," or petition for clemency, in order to obtain relief from the underlying conviction. *McKithen* v. *Brown*, 481 F.3d 89, 103 (2d Cir. 2007), cert. denied, 128 S. Ct. 1218 (2008). Moreover, DNA testing will not prove exculpatory in every case—and where testing is either inculpatory or inconclusive, the prisoner would obviously have no basis to challenge his conviction. For those reasons, "the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence." *Harvey*, 285 F.3d at 308 (opinion of Luttig, J.).

It would be particularly inequitable, moreover, to bar a prisoner from bringing a Section 1983 action, because it is unclear whether an access-to-evidence claim could properly be asserted as the basis for a habeas petition. In fact, petitioners do not even concede that an access-to-evidence claim would be independently cognizable in a habeas petition. The habeas statute permits a court to entertain a habeas petition by a state prisoner only where the prisoner is contending that "he is *in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a) (emphasis added). While this Court has taken a broad view of the remedial powers of a habeas court, "[i]t is one thing to say that permissible habeas relief * * * includes ordering a

quantum change in the level of custody" and "quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody." *Dotson*, 544 U.S. at 86 (Scalia, J., concurring) (internal quotation marks omitted). The relief that respondent seeks here—an injunction ordering access to evidence—certainly differs from the relief usually awarded by habeas courts. At a minimum, it is clear that respondent's claim does not lie at "the core of habeas corpus"—and, for that reason, respondent's action should not be foreclosed by the implicit exception to Section 1983's plain terms. *Preiser*, 411 U.S. at 489.

B. Petitioners' Contrary Contentions Lack Merit

1. In the face of this Court's precedents concerning the interplay between Section 1983 and the federal habeas statute, petitioners contend (Br. 21-28) that respondent's access-to-evidence claim is the functional equivalent of a discovery request antecedent to a federal actual-innocence claim. Because any actual-innocence claim could be brought only in a habeas petition, petitioners' reasoning goes, the access-to-evidence claim may not be brought in a Section 1983 action.

Petitioners' contention—which also infuses their analysis of respondent's underlying constitutional claim, see, *e.g.*, Br. 38-43—fails for the simple reason that the access-to-evidence claim is not inherently antecedent to an actual-innocence claim that would be brought in a subsequent federal habeas petition. In the event that a prisoner obtains a favorable DNA test result in the wake of a successful access-to-evidence claim, it is not automatic, nor even likely, that the prisoner would file a federal habeas petition, particularly given the unsettled

state of the law concerning freestanding claims of actual innocence (and the high substantive standard that would presumably apply to such claims). See *House* v. *Bell*, 547 U.S. 518, 555 (2006). On the contrary, experience teaches that the prisoner would be more likely either to proceed through established mechanisms for postconviction relief or clemency or to seek prosecutorial consent. See *Judging Innocence Update* (noting that prosecutors had consented to motions to vacate convictions in 88% of cases resulting in exonerations). In those circumstances, a Section 1983 action seeking access to evidence for DNA testing would constitute the end, not just the beginning, of proceedings in federal court. A claim of access to evidence is therefore a freestanding constitutional claim in its own right; it is not necessarily bound up with an underlying federal claim of actual innocence, such that the failure to plead the former without the latter somehow constitutes artful pleading (as petitioners suggest, Br. 26-28).

Petitioners seemingly suggest that, if a prisoner wishes to obtain access to evidence for DNA testing, he should first file a habeas petition seeking relief based on actual innocence (notwithstanding the absence of any evidence to support that claim in the first place). Even assuming, however, that a prisoner could bring an actual-innocence claim in a federal habeas petition (an assumption, ironically enough, that petitioners resist), the prisoner would not necessarily be entitled to obtain access to evidence for DNA testing in the resulting habeas proceeding, as petitioners themselves concede. See Br. 34. This Court has long made clear that a habeas petitioner has no entitlement to discovery, see, *e.g.*, *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997); *Harris* v. *Nelson*, 394 U.S. 286, 295 (1969); instead, the decision whether to provide discovery is left to the district court's discretion,

see Fed. R. Governing Section 2254 Cases 6(a); *Lonchar* v. *Thomas*, 517 U.S. 314, 326 (1996).[9] The upshot of petitioners' position is clear: an access-to-evidence claim not only is not cognizable in a Section 1983 action, but it may not be cognizable in federal court *at all*. That cannot be, and thankfully is not, the law.

2. Petitioners' remaining contentions are equally unfounded.

a. Petitioners contend that respondent's access-to-evidence claim may be brought only in a habeas petition on the ground that his ultimate purpose in seeking access to evidence is to establish his innocence (and therefore to challenge his confinement). See, *e.g.*, Br. 19 (contending that, "[s]tripped to its essence, [respondent's] § 1983 action is nothing more than a request for evidence to support a hypothetical claim that he is actually innocent"). That contention, however, cannot be reconciled with *Dotson*, in which the Court reasoned that it would be erroneous to jump from the "true premise" that the prisoners hoped that success on their claim (challenging the constitutionality of their earlier parole proceedings) would lead to their earlier release, to the "faulty conclusion" that their claims could be brought only in a habeas petition. 544 U.S. at 78. *Dotson* makes clear, if further clarification were needed, that the test for when a Section 1983 action is implicitly foreclosed in no way turns on the motive of the claimant.

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[9] Indeed, it would be passing strange if a prisoner would be obligated to file a habeas petition seeking relief based on actual innocence without any evidence to support that claim, for the sole purpose of obtaining that evidence in discovery. Cf. Pet. App. 17a (noting the "Catch-22" that "the State has opposed [respondent's] access-to-evidence claim based on the argument that [respondent] cannot prove his actual innocence[,] yet [respondent] needs access to the evidence to make that very showing").

b. Petitioners alternatively contend (Br. 33) that this Court should hold that there is another category of claims that are not cognizable under Section 1983, beyond those in which "a judgment in favor of the [prisoner] would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. This Court has rejected similar efforts in the past, see, *e.g.*, *Dotson*, 544 U.S. at 81, and it should do so again here. Petitioners, moreover, make no effort to suggest an actual standard for their new category of claims that would be barred in Section 1983 actions. The closest they come is by suggesting (Br. 32) that respondent's claim should be precluded because success on that claim is the "*sine qua non*" of a claim that could eventually lead to the invalidation of the underlying confinement. *Dotson*, however, forecloses such a standard as well, because success on the instant claims in that case was similarly the *sine qua non* of any subsequent claims that would eventually lead to the prisoners' release. See 544 U.S. at 82. Petitioners offer no new justification for broadening the standard of *Heck* and its progeny into the but-for standard that they seemingly propose. Respondent's access-to-evidence claim is therefore plainly cognizable in a Section 1983 action.[10]

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[10] The Court need not decide in this case any question concerning when a Section 1983 action raising a constitutional right-of-access claim is timely. Petitioners have never argued that respondent's claim is untimely, and such claim would therefore be forfeited.

II. THE COURT OF APPEALS CORRECTLY HELD THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, RESPONDENT WAS ENTITLED TO OBTAIN POSTCONVICTION ACCESS TO EVIDENCE FOR DNA TESTING AS A MATTER OF DUE PROCESS

In this case, the State of Alaska has refused to permit access to evidence in its possession for DNA testing at respondent's own expense—DNA testing that the State now concedes could conclusively prove his innocence (and could thereby be used for the purpose of obtaining relief from his conviction). Whether it is couched in terms of "procedure" or "substance"—"[a]nd with a claim such as this, the line of demarcation is faint," *Harvey*, 285 F.3d at 318 (opinion of Luttig, J.)—the State's refusal to permit access to the evidence, in the absence of any valid reason for doing so, offends basic principles of due process.

A. Respondent Is Entitled To Obtain Access To The Evidence As A Matter Of Procedural Due Process

1. Respondent Satisfies The Requirements For A Procedural Due Process Claim

In order to establish that the failure to provide access to evidence for DNA testing would constitute a breach of procedural due process, respondent must show, first, that he has an interest in "life, liberty, or property" that is protected by the Due Process Clause, and second, that the failure to provide access to the evidence would deprive him of that interest without the "process of law" that he is due. U.S. Const. Amend. XIV. Respondent readily satisfies both requirements.

a. Respondent has a liberty interest in meaningful access to mechanisms for postconviction relief

i. Neither petitioners nor the United States resists the proposition that an access-to-evidence claim could implicate a liberty interest that the Due Process Clause protects. Cf. Pet. Br. 47 (leaving open possibility that "a prisoner serving a validly imposed sentence might possess" a "residual liberty interest"); U.S. Br. 32-33 (suggesting that the Court "need not reach the question whether (or in what circumstances) there is any liberty interest supporting the creation of a procedural due process right"). And for good reason. Although this Court has recognized that an individual's liberty interest in freedom from confinement is at least to some extent extinguished once he has been convicted and sentenced of a non-capital crime, see *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 280 (1998) (plurality opinion); *id.* at 288, 289 (O'Connor, J., concurring in part and concurring in the judgment), the Court has also consistently recognized that an individual still retains "a residuum of constitutionally protected liberty while in legal custody pursuant to a valid conviction." *Meachum* v. *Fano*, 427 U.S. 215, 232 (1976); see *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316 (1982) (citing cases).

Of course, a State is under no obligation to provide a prisoner with particular mechanisms for postconviction relief; this Court has suggested that a State could even preclude a prisoner from taking a direct appeal from his conviction. See *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Where a State *creates* mechanisms for postconviction relief, however, it is a familiar principle that "the procedures used * * * must comport with the demands of the Due Process [Clause]." *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). Thus, relying in part on proce-

dural due process, the Court has held that, where a State provides for a direct appeal as of right, it must afford a criminal defendant an adequate and effective opportunity to present his claims. See, *e.g.*, *Douglas* v. *California*, 372 U.S. 353, 358 (1963) (holding that a State must provide for the appointment of counsel on appeal to an indigent defendant); *Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956) (holding that a State must provide free trial transcripts). Those decisions are rooted in the broader principle that proceedings provided by the State must be "essential[ly] fair[]," even if the proceedings themselves are not constitutionally mandated. *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 120 (1996).

Where a State creates mechanisms for postconviction relief by which a prisoner may obtain relief from his underlying conviction, therefore, the prisoner has a liberty interest in meaningful access to those mechanisms, so as to avoid rendering the provision of those mechanisms arbitrary or futile. See *Ake* v. *Oklahoma*, 470 U.S. 68, 77 (1985) (noting that "[m]eaningful access to justice has been the consistent theme" of this Court's due process jurisprudence); cf. *Bounds* v. *Smith*, 430 U.S. 817, 821 (1977) (holding that provision of law libraries or similar resources to prisoners was necessary to protect "constitutional right of access to the courts"). Notably, that liberty interest exists even if the State is not required to use any particular procedures in a given form of proceeding, and even if the State may leave the ultimate decision on whether to provide relief to the discretion of the decisionmaker. Compare *Woodard*, 523 U.S. at 279-285 (plurality opinion) (concluding that no procedures are required in clemency proceedings), with *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) (contending that "some *minimal* procedural safeguards apply to clemency proceedings").

ii. In respondent's case, the State of Alaska has created at least two mechanisms through which respondent could raise a claim of actual innocence. Because DNA testing of evidence in the State's possession could indisputably provide conclusive evidence of respondent's actual innocence—and, as a practical matter, likely provides the only means by which he could make the showing of innocence required to obtain relief—respondent's claim implicates a liberty interest in meaningful access to those mechanisms.

First, Alaska, like virtually every other State, permits a prisoner to move for postconviction relief on the basis of evidence of actual innocence.[11] Specifically, a prisoner may bring such a claim under Alaska law where "there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice." Alaska Stat. § 12.72.010(4). Notably, a prisoner may bring such a claim even outside the ordinarily applicable time limits if the claim is "based on newly discovered evidence," provided that the prisoner "establishes due

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[11] In *Herrera* v. *Collins*, 506 U.S. 390 (1993), this Court noted that "[o]nly 15 States allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction." *Id.* at 411. Thanks largely to the advent of DNA testing, however, the landscape has changed dramatically: our research indicates that 49 of the 50 States now provide at least one, and sometimes more than one, mechanism by which a prisoner may seek relief based on evidence of innocence such as a favorable DNA test result, even if the ordinarily applicable time limits have expired. The law in the other State, South Dakota, remains unclear. See *Jenner* v. *Dooley*, 590 N.W.2d 463, 471 (S.D. 1999) (stating that "courts should solemnly consider reopening a case if a truly persuasive showing of actual innocence lies close at hand") (internal quotation marks omitted). Of course, a favorable DNA test result will ordinarily constitute the best possible evidence of innocence.

diligence in presenting the claim and sets out facts supported by evidence that * * * establishes by clear and convincing evidence that the [prisoner] is innocent." Alaska Stat. § 12.72.020(b)(2). Respondent would satisfy the requirements of that provision, because a favorable DNA test result would constitute "newly discovered evidence" that, by petitioners' own concession, would conclusively establish his innocence. Reply Br. 8.[12]

Second, Alaska, like every other State, confers broad authority on its governor to grant clemency (in the form of "pardons, commutations, and reprieves"). Alaska Const. Art. III, § 21. As this Court has recognized, throughout history, clemency "has provided the 'fail safe' in our criminal justice system." *Herrera* v. *Collins*, 506 U.S. 390, 415 (1993). And one of the primary uses of the clemency power has been to provide relief for convicted individuals who present compelling evidence of their innocence. See *Judging Innocence* 120 (noting that nearly one-quarter of the individuals exonerated through DNA testing received pardons).

Because respondent has a constitutionally protected liberty interest in meaningful access to state postconviction proceedings and executive clemency proceedings, this Court need not decide whether respondent could pursue a freestanding actual-innocence claim as a matter of federal constitutional law (and whether respondent therefore has a concomitant liberty interest in meaningful access to those proceedings). Although respondent believes that he would be entitled to pursue an actual-innocence claim as a matter of federal law (and would

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[12] In addition, it appears that the Alaska Constitution would provide an independent "safety valve" mechanism by which a prisoner could challenge his conviction where a DNA test result clearly indicates the prisoner's innocence. See Pet. App. 89a.

therefore have a liberty interest in meaningful access to such proceedings), the Court left open that question as recently as three Terms ago, see *House*, 547 U.S. at 554-555, and it can do so again here. In any event, given the reality that, where a DNA test result is exculpatory, a prisoner can (and almost invariably does) obtain relief through state postconviction proceedings, clemency, or prosecutorial consent, see p. 23, *supra*, it will be the rare case in which such a prisoner would need to seek relief by means of a federal actual-innocence claim instead—and the Court can address the availability of such a claim when and if one is actually brought. In this case, the availability of other, well-established mechanisms through which respondent could obtain relief from his conviction based on a favorable DNA test result suffices to demonstrate that respondent's claim implicates a constitutionally protected liberty interest.

b. Respondent is entitled to access to the evidence for DNA testing at his own expense

i. The remaining question is whether the provision of access to the evidence is necessary in this case in order to afford sufficient process to protect respondent's liberty interest in meaningful access to mechanisms for postconviction relief. That question should be addressed, and resolved, under the familiar balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Under that test, a court is required to consider, first, "the private interest that will be affected by the official action"; second, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and third, "the Government's interest, including the function involved and the fiscal and administrative bur-

dens that the additional or substitute procedural requirement would entail." *Id.* at 335.

In this case, those factors tip decisively in favor of requiring Alaska to provide respondent with access to the evidence at issue. With regard to the first two factors, the analysis is so straight-forward as to hardly require exposition. As to the private interest affected by the official action, this Court has made clear that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." *Ake*, 470 U.S. at 78; see *Schlup* v. *Delo*, 513 U.S. 298, 321 (1995) (noting that "a prisoner retains an overriding interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated") (internal quotation marks omitted). That interest is obviously served by obtaining access to evidence for DNA testing, at least where (as here) that testing was not available in a comparable form at trial, because there have been "extraordinary scientific advance[s]" in DNA testing that "have the potential in certain instances to prove beyond *all* doubt whether the requesting person in fact committed the crime for which he was convicted and sentenced." *Harvey*, 285 F.3d at 310 (opinion of Luttig, J.). Indeed, given that Alaska, like many other States, requires near-absolute proof of innocence to obtain postconviction relief outside a strict limitations period (and further requires the evidence presented to be "new"), it is difficult to imagine any other way in which a prisoner ordinarily could hope to prevail in such proceedings.

As to the risk of an erroneous deprivation of that interest, Alaska's steadfast refusal to permit access to the evidence in this case clearly presents such a risk, in light of the proven ability of DNA testing to exonerate convicted individuals (even individuals who pleaded guilty,

confessed to the crime, or were convicted in the face of what appeared at the time to be overwhelming evidence of guilt). See pp. 3-4, *supra*. In this case, moreover, there are no meaningful procedural safeguards for respondent's interest, because the State has provided no statutory mechanism for obtaining access to the evidence for DNA testing.[13]

With regard to the State's interest in refusing to permit access to the evidence, the analysis is scarcely more complicated, because the State has articulated *no* valid interest for its refusal to permit access to evidence for DNA testing that would occur at respondent's own expense. In fact, in response to repeated questions at oral argument before the court of appeals as to why the State was refusing to permit access to the evidence, petitioners defiantly stated that they were not "willing or able" to answer those questions "at this time." See Taboline Brandt, *Case Tests Alaska's DNA Policies*, Anchorage Daily News, Aug. 21, 2005 (recounting oral argument).

Insofar as petitioners belatedly attempt to identify any interest before this Court, they simply invoke a generic interest in the finality of criminal convictions. See,

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[13] To the extent that, in respondent's state postconviction proceedings, the Alaska Court of Appeals left open the possibility that the Alaska Constitution may provide a right to postconviction access to evidence, the resulting procedure would not meaningfully reduce the risk of an erroneous deprivation of the private interest in the accuracy of a criminal proceeding, because the court's proposed standard for that hypothetical right improperly focuses on the perceived strength of the evidence presented at trial, and would bar altogether prisoners whose convictions did not "rest[] primarily on eyewitness identification evidence." Pet. App. 111a. That standard could result in the erroneous deprivation of access to the evidence for prisoners, like respondent, for whom DNA testing could conclusively prove their innocence.

e.g., Pet. Br. 18, 50. The court of appeals, however, correctly refused to attach dispositive weight to that interest in this context. See Pet. App. 42a-43a. While the State has an undoubted interest in the finality of criminal convictions, the State's overall interests are served, not disserved, by allowing access to evidence for DNA testing in the class of cases in which such testing can provide *more* accurate and reliable evidence about the perpetrator's identity than was available at the time of conviction. Cf. *Herrera*, 506 U.S. at 403 (noting that, ordinarily, "the passage of time only diminishes the reliability of criminal adjudications"). Where DNA testing inculpates the prisoner, it will simply confirm the validity of the original conviction. But where DNA testing exculpates the prisoner, it will serve the State's "paramount interests" in "seeking justice" and "not obtaining convictions at all costs," Pet. App. 43a—and, in many cases, thanks to CODIS, it will allow the State to identify and pursue the true perpetrator of the original offense (and to prevent him from committing other offenses).[14] Notably, the amicus States recognize the exceptional importance of DNA testing in this regard, even if petitioners do not. See Br. of California et al. 2 (noting that "DNA evidence can be of central importance to postconviction litigation concerning actual innocence" and that "[t]he necessity for a meaningful opportunity to obtain postconviction DNA testing in appropriate cases is not in dispute") (internal quotation marks omitted).

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[14] That interest could still be served in this case, notwithstanding petitioners' longstanding refusal to provide access to the evidence for DNA testing, because there is no limitations period under Alaska law for felonious sexual assault or kidnapping. See Alaska Stat. § 12.10.010(a).

For its part, the United States contends (Br. 27 n.5) that the State has an interest in "avoiding indefinite relitigation by prisoners who have already exhausted their appeals and other postconviction relief." To the extent that asserted interest differs from petitioners', it is equally unavailing. It is questionable whether, in determining whether a claimant is entitled to additional process under the balancing test of *Mathews*, a court should consider the burden that the State faces from simply litigating the question whether additional process is due (as opposed to the burden from providing the process that the claimant seeks). But in any event, there is no reason to believe that the resulting burden will be a substantial one. In this case, of course, the State can alleviate any burden through the simple expedient of providing access to the evidence. And more broadly, notwithstanding the fact that it has been eight years since the first final federal decision recognizing a constitutional right of access to evidence, see *Godschalk* v. *Montgomery County Dist. Att'y's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001), no flood of litigation asserting such a right has resulted, not least because of the ready availability of statutory or consensual remedies. See p. 6 n.2, *supra*.[15] Because there is no valid countervailing state interest in refusing

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[15] Our review of published and unpublished federal decisions has discovered only 22 cases in which constitutional access-to-evidence claims have been asserted in Section 1983 actions since *Godschalk*, including only one in the district in which *Godschalk* itself was decided. See *Ross* v. *Lehigh County Dist. Att'y's Office*, Civ. No. 07-2329, 2008 WL 5234411 (E.D. Pa. Dec. 15, 2008). In fact, there has been no flood of claims under statutory testing regimes either. For example, in Cook County, Illinois (the second-largest county in the Nation), only 12 applications for DNA testing were filed in the first three years after the Illinois testing statute took effect. See S. Rep. No. 315, 107th Cong., 2d Sess., Pt. 4(b)(1), at 12 (2002).

to provide respondent with access to the evidence in his case for DNA testing at his own expense, the provision of access is necessary as a matter of procedural due process.[16]

ii. The United States contends (Br. 15-16) that respondent's procedural due process claim is governed not by the familiar balancing test of *Mathews*, but rather by the "narrower" test of *Medina* v. *California*, 505 U.S. 437 (1992), which focuses on whether a challenged procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 445 (internal quotation marks omitted). That contention is unfounded and in any event irrelevant to the ultimate outcome here.

As a preliminary matter, it is doubtful that the *Medina* test applies in this case. This Court has not applied *Medina* in subsequent cases, and, in *Medina* itself, the Court indicated that its test applied only to challenges to "the validity of state procedural rules which * * * are part of the criminal process." 505 U.S. at 443. Here, respondent is not raising any challenge either to his conviction or to any aspect of the process by which he was convicted; instead, he is challenging a subsequent governmental decision to deny him access to the evidence by which he was convicted, for the purpose of engaging in testing that was unavailable at the time of his trial. This

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[16] Because respondent has agreed to pay for his own DNA testing, petitioners have not asserted any state interest arising from the expense of providing for testing. The Court therefore need not consider whether the analysis would be different in a case in which a prisoner contends that the government is obligated to pay for DNA testing. That issue may arise only rarely, however, because the federal government and many States already provide funding for DNA testing for indigent prisoners. See, *e.g.*, 18 U.S.C. 3600(c)(3)(B); p. 6, *supra*.

is therefore not a case in which respondent is seeking micromanagement of criminal procedure under the guise of "due process." Cf. *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (applying *Mathews*, not *Medina*, to the seizure of real property subject to civil forfeiture). Moreover, in *Medina*, the Court granted "substantial deference to the legislative judgment" at issue there, see 505 U.S. at 446, whereas this case involves no legislative judgment at all.

Even if the *Medina* test were to apply here, however, respondent would satisfy it. As noted above, the principal inquiry under *Medina* is whether a challenged procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 505 U.S. at 445 (internal quotation marks omitted). If this test were applied in an excessively literal fashion, respondent would concededly fail it, because there could be "no settled tradition" of granting access to evidence for DNA testing when such testing did not even exist until twenty years ago (and did not exist in its current form until even more recently). *Id.* at 446.

When "history and tradition [are] defined at the appropriate level of generality," however, the *Medina* test is satisfied. *Harvey*, 285 F.3d at 315 n.6 (opinion of Luttig, J.). That is because the failure to permit access to evidence for DNA testing offends the core objective of our criminal justice system: namely, that "the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975); see, *e.g.*, *Portuondo* v. *Agard*, 529 U.S. 61, 73 (2000); *Berger* v. *United States*, 295 U.S. 78, 88 (1935). A necessary corollary of that principle is that the criminal justice system is centrally "concern[ed] about the injustice that results from the conviction of an innocent person." *Schlup*, 513 U.S. at

325. For that reason, clemency, a practice that is itself "deeply rooted in our Anglo-American tradition of law," has historically been available as "the 'fail-safe' in our criminal justice system," for situations in which "after-discovered evidence" demonstrates a convicted individual's innocence. *Herrera*, 506 U.S. at 411-412, 415. In light of the unprecedented ability of current DNA testing conclusively to establish innocence, the denial of access to evidence for DNA testing would contravene the fundamental (and long-established) truth-seeking objective of the criminal justice system.

In addition, while the focus of the *Medina* inquiry is on the existence of a tradition supporting the claimed entitlement, the Court indicated in *Medina* that it would also consider, first, whether the challenged procedure was consistent with "[c]ontemporary practice," 505 U.S. at 447, and second, whether it "transgresses any recognized principle of fundamental fairness in operation," *id.* at 448 (internal quotation marks omitted). Those considerations likewise counsel in respondent's favor. With regard to contemporary practice, some 44 States and the federal government have statutes providing for postconviction DNA testing; Alaska is one of only six States that have not yet enacted DNA testing statutes, and, as far as we are aware, is the only one of those States that has not conducted a single postconviction DNA test pursuant to court order or consent. See pp. 6-7, *supra*; cf. *Griffin*, 351 U.S. at 19 (noting that a State's procedure is a "misfit" where only a "few" States follow the same procedure). And with regard to fundamental fairness, the State's failure to articulate *any* valid interest for its failure to provide respondent access to evidence for DNA testing is conclusive on that score, in light of the fact that, by petitioners' own concession, a favorable test result would conclusively establish respondent's innocence.

Thus, under *Medina*, as well as *Mathews*, the State's refusal to permit access to the evidence contravenes procedural due process.

2. *This Court's Access-To-Evidence Cases Support Respondent's Procedural Due Process Claim*

a. The foregoing analysis is supported by this Court's cases concerning "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In those cases—which sound in procedural due process, and which either explicitly or implicitly employ the balancing approach of *Mathews*, see, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 631 (2002)—the Court has recognized that state officials have broad obligations not simply to provide requested access to evidence to a criminal defendant, but to disclose that evidence as well. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667 (1985); *United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972).

The most prominent of the Court's access-to-evidence cases, of course, is *Brady* v. *Maryland*, 373 U.S. 83 (1963), in which the Court first held that the suppression of material exculpatory evidence violates a defendant's right to due process. In this case, the court of appeals relied on *Brady* in recognizing that respondent possessed a due process right to obtain postconviction access to evidence for DNA testing. See, *e.g.*, Pet. App. 16a.

Petitioners (Br. 36-38) and the United States (Br. 12-15) contend that the court of appeals thereby erred because *Brady*, by its terms, applies only to the failure to disclose evidence pretrial, not postconviction. If the court of appeals had held that the full range of *Brady* obligations applies across the board postconviction, as

well as pretrial, petitioners' contention would have some force, not least because it would undeniably be impractical to charge prosecutors in all circumstances with knowledge of materially exculpatory evidence that may come to light long after trial. See *Harvey*, 285 F.3d at 317 (opinion of Luttig, J.) (agreeing that "no one would contend that fairness, in the constitutional sense, requires a post-conviction right of access or a right to disclosure anything approaching in scope that which is required pre-trial").

The fairer reading of the court of appeals' opinion, however, is that, like other courts to have considered the issue, it relied on *Brady* not as controlling authority, but rather for "the due process principles that motivated *Brady*, including fundamental fairness [and] the prosecutor's obligation to do justice rather than simply obtain convictions." Pet. App. 23a (citing cases). Specifically, *Brady* and its progeny relied heavily on the foundational principle that the ultimate goal of the criminal justice system is to ensure not simply that a defendant is convicted, but that justice is done—and, *a fortiori*, that the government should not stand in the way of justice being done. See, *e.g.*, *Bagley*, 473 U.S. at 675 (noting that "[the] purpose [of the *Brady* line of cases] is * * * to ensure that a miscarriage of justice does not occur"); *Agurs*, 427 U.S. at 110-111 (explaining that the government has an "overriding interest that justice shall be done" and that the prosecutor "is the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer") (internal quotation marks omitted); *Brady*, 373 U.S. at 87 n.2 (quoting Solicitor General Sobeloff's remarks that the government's "chief business is not to achieve victory but to establish justice" and that the government "wins its point when justice is done in its courts") (internal quotation marks omitted).

Contrary to petitioners' contention (Br. 37), therefore, the rules of *Brady* and its progeny do not merely promote a "fair trial" as an end in itself. Rather, they promote a fair trial for the broader purpose of ensuring that the trial process performs its "truth-seeking function." *Agurs*, 427 U.S. at 104; cf. *Ruiz*, 536 U.S. at 631 (holding that *Brady* does not require disclosure of impeachment evidence where the plea agreement already required the government to provide "any information establishing the factual innocence of the defendant"). So too here, "the very same principle of elemental fairness that dictates pre-trial production of *all* potentially exculpatory evidence dictates post-trial production of th[e] infinitely narrower category of evidence" as to which DNA testing could prove innocence. *Harvey*, 285 F.3d at 317 (opinion of Luttig, J.) (emphasis added).[17]

b. Respondent's access-to-evidence claim is supported not only by the strand of cases in the *Brady* line, but also by the strand of cases that prohibit the State from *destroying* potentially or apparently exculpatory evidence in its possession. See *Arizona* v. *Youngblood*, 488 U.S. 51 (1988); *California* v. *Trombetta*, 467 U.S. 479 (1984). To be sure, those cases, like the cases in the *Brady* line, are not directly applicable here. Like the

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[17] This case, moreover, differs from the *Brady* cases in two respects that further support the recognition of an obligation to permit access to the evidence here. First, whereas a trial prosecutor has an affirmative (and substantial) duty to learn of and disclose all exculpatory evidence in the State's possession under *Brady*, petitioners in this case are arbitrarily refusing to grant respondent's specific request for access to evidence whose existence is already known to all. Second, whereas the traditional remedy under *Brady* is vacatur of the underlying conviction, respondent in this case is seeking the more modest remedy of access to the evidence, with no burden to the State.

Brady cases, however, those cases rest on the fundamental principle that the goal of the criminal justice system is to "protect[] the innocent from erroneous conviction." *Trombetta*, 467 U.S. at 485. And where the government "withhold[s] from the convicted, *for no reason at all*, the very evidence that it used to deprive him of his liberty" and where "further tests of the evidence could * * * establish to a certainty whether he actually is factually innocent of the crime for which he was convicted," the denial of access to evidence comes "so perilously close to [bad faith] as not to be permitted." *Harvey*, 285 F.3d at 318 (opinion of Luttig, J.). In sum, this Court's access-to-evidence cases provide further support for the conclusion that procedural due process does not allow the State to refuse to permit access to the evidence here.

B. Respondent Is Entitled To Obtain Access To The Evidence As A Matter Of Substantive Due Process

Under the circumstances of this case, the failure to provide respondent with access to the evidence for DNA testing would constitute a breach not only of procedural due process, but of substantive due process as well.

1. This Court has repeatedly made clear that the "touchstone" of due process is "protection of the individual against arbitrary action of [the] government." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845-846 (1998) (internal quotation marks omitted). The doctrine of substantive due process protects against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective," and "the cognizable level of executive abuse of power" is "that which shocks the conscience." *Id.* at 846 (internal quotation marks omitted); see *Rochin* v. *California*, 342 U.S. 165, 172-173 (1952).

The State's decision deliberately to withhold access to the evidence in this case, in the face of respondent's request, rises to the level of conscience-shocking behavior. Because the State has offered no legitimate explanation for its refusal to grant access to the evidence, that refusal is arbitrary—indeed, shockingly so, in light of the potential of that evidence to clear respondent completely of the crime of which he was convicted (and to identify the true perpetrator of the original offense). See *Harvey*, 285 F.3d at 319 (opinion of Luttig, J.) (noting "the patent arbitrariness of denying access to such evidence in the absence of any governmental interest whatsoever in the withholding of such"). Such conduct "offend[s] the community's sense of fair play and decency," *Rochin*, 342 U.S. at 173, and as such cannot be reconciled with the requirements of due process. And to the extent that history and tradition are relevant to (if not dispositive of) the substantive due process inquiry, see, *e.g.*, *Lewis*, 523 U.S. at 856 (Kennedy, J., concurring), the longstanding principle that the core objective of our criminal justice system is to ensure that "the guilty be convicted and the innocent go free," *Herring*, 422 U.S. at 862, supports recognition of a substantive due process right of access to evidence for DNA testing. See pp. 37-38, *supra*.[18]

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[18] Although a State ordinarily bears no affirmative obligation to make postconviction disclosures concerning the evidence as a matter of procedural due process, see pp. 39-40, *supra*, there may be circumstances in which the failure to make such disclosures would be sufficiently arbitrary to raise due process concerns. If, for example, the State had actually conducted STR testing on the evidence in this case post-trial and the results had conclusively proven respondent's innocence, similar due process considerations to those presented here would surely mandate the disclosure of those results.

2. Citing *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), the United States contends that, "where the democratic process is already actively addressing the subject," this Court should be reluctant to recognize the existence of a substantive due process right. Br. 8. In that case, the plaintiffs were asking this Court to recognize a due process right to engage in assisted suicide—a practice that was prohibited by 44 States, see 521 U.S. at 710 n.8, and that "the Anglo-American common-law tradition ha[d] punished or otherwise disapproved of" for "over 700 years," *id.* at 711. Although States were "currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," the Court noted that States had "not retreated from th[e] prohibition" of assisted suicide. *Id.* at 719. The Court proceeded to note, moreover, that the State had a number of "unquestionably important and legitimate" interests in prohibiting assisted suicide, *id.* at 735, ranging from the State's interest in protecting life itself to its interest in protecting the ill, elderly, and disabled from abuse and neglect, see *id.* at 728-735.

This case could not be more different from *Glucksberg*. Unlike the plaintiffs in *Glucksberg*, respondent is not asking the Court to invalidate a statutory provision that reflects the judgment of a state legislature; instead, he is merely challenging an executive decision to deny him access to evidence for DNA testing. More generally, whereas 44 States had *prohibited* the practice that was the basis of the claim in *Glucksberg*, 44 States have adopted statutes providing for access of the very kind that respondent seeks as a matter of due process—and have done so in rapid response to the watershed technological advance that DNA testing in general (and STR testing in particular) represents. Unlike in *Glucksberg*, therefore, a ruling in respondent's favor would not re-

quire that the Court effectively overturn a large number of state statutes—indeed, insofar as no State *prohibits* the provision of access to evidence for DNA testing, the Court would not have to overturn any statutes at all. And unlike in *Glucksberg*, the State articulates no valid interest whatsoever in support of its refusal to grant respondent access to the evidence in his case.

While this Court rightly exercises the "utmost care" in deciding whether to recognize a right as a matter of substantive due process, *Glucksberg*, 521 U.S. at 720 (internal quotation marks omitted), the United States articulates no valid justification as to why this Court should wait before addressing the issue here. And it is worth remembering that the practical effect of doing so would be to deny relief both to respondent, who has no alternative avenue for obtaining access to the evidence in his case for potentially exculpatory DNA testing in the face of the State's arbitrary refusal to provide it, and to any other individuals who are similarly situated in the Nation's prisons and on the Nation's death rows. The Court should not countenance such paradigmatically conscience-shocking behavior.

C. Whatever The Precise Contours Of A Due Process Right Of Access To Evidence For DNA Testing, Respondent Is Entitled To Obtain Access

For the reasons discussed above, petitioners' conduct in this case—*viz.*, their refusal to permit access to the evidence used at trial for DNA testing at respondent's own expense, in the absence of a valid justification for doing so and despite their recognition that a favorable DNA test would conclusively prove respondent's innocence—violates due process. The Court need not resolve for all time the precise contours of a due process right of access to evidence for DNA testing in order to recognize that respondent was deprived of due process under the

circumstances presented here. To the extent that petitioners and their amici contend that even *respondent* is not entitled to access to the evidence for DNA testing, those contentions are unavailing.

1. The court of appeals correctly held that, under the circumstances of this case, petitioners' conduct violated due process. See Pet. App. 44a. In particular, the court of appeals properly recognized that the most important component of a claim of a right of access to evidence for DNA testing—and the most important limit on the scope of such a right—is that the prisoner must show that there is at least some degree of probability that a favorable DNA test result would cast doubt on his guilt. See *id.* at 26a-28a. Looking by analogy to the materiality standard of *Brady*, the court of appeals concluded that the applicable substantive standard for access-to-evidence claims is "no higher than a *reasonable probability* that, if exculpatory DNA evidence were disclosed to [respondent], he could prevail in an action for post-conviction relief." *Id.* at 28a (emphasis added).

In respondent's view, that standard—which effectively tracks the standard in the federal Innocence Protection Act, see 18 U.S.C. 3600(a)(8)(B), and numerous state statutes, see p. 6, *supra*—is appropriate. Because the relief ordered on an access-to-evidence claim is merely access to the evidence for DNA testing, such relief in no way burdens or prejudices the State—and, *a fortiori*, it seems reasonable to require a prisoner to make a showing comparable to the showing that would enable a prisoner to vacate his conviction *entirely* under *Brady*. See p. 41 n.17, *supra*.

Ultimately, however, it is not necessary for the Court to articulate the exact degree of probability that is required in order to state a valid access-to-evidence claim, because, as the court of appeals noted, "[w]herever the

bar is, [respondent] crosses it." Pet. App. 27a. That is particularly true in light of petitioners' concession at the certiorari stage—after years of litigating the issue—that a favorable test result "would *conclusively* establish [respondent's] innocence." Reply Br. 8 (emphasis added). This case therefore does not present the issue whether due process would also require access to evidence for DNA testing where an exculpatory DNA test result would cast some lesser degree of doubt on the prisoner's guilt.[19]

2. Petitioners and their amici make two primary contentions as to why respondent is not entitled to obtain access to the evidence for DNA testing as a matter of due process. Both of those contentions lack merit.

a. Both petitioners and the United States suggest that, if this Court were to hold that due process requires a State to provide access to the evidence for DNA testing in some circumstances, it should do so only where, based on an assessment of the apparent strength of the evidence presented at trial, a court concludes that the results of such testing are likely to be exculpatory. See Pet. Br. 36 (stating that "there has never been any doubt that [respondent] was the perpetrator"); U.S. Br. 26 (asserting that "it appears quite likely that further DNA testing would only provide further evidence of respon-

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[19] It is important to note, however, that *any* plausible formulation of the substantive standard for access-to-evidence claims would have the effect of ensuring that such claims would not be brought in the overwhelming majority of cases. Only a small percentage of felony cases are prosecuted with forensic evidence—and only a small percentage of those cases, in turn, are suitable for DNA analysis. See Department of Justice, *Census of Publicly Funded Crime Laboratories, 2002*, at 6 (2006) (noting that only 2% of forensic cases involve DNA testing).

dent's guilt"). By definition, however, every prisoner who is seeking access to evidence for DNA testing post-trial will have been found guilty on the basis of proof beyond a reasonable doubt—and it would be peculiar to afford that access based on a court's assessment of the degree of residual doubt concerning the prisoner's guilt. Cf. *Oregon* v. *Guzek*, 546 U.S. 517, 523 (2006) (rejecting claim that the Eighth Amendment permits a capital defendant to introduce additional evidence pertaining to residual doubt about guilt at sentencing).

As discussed above, moreover, DNA testing has exonerated many individuals who were convicted in the face of seemingly overwhelming evidence of guilt. See pp. 3-4, *supra*. Indeed, in nearly half of cases resulting in exonerations, a court had previously commented on the exoneree's likely guilt, and, in 10% of those cases, a court had characterized the evidence of guilt as "overwhelming." *Judging Innocence* 107 tbl. 8, 109. If the availability of a right of access were contingent on a court's assessment of the apparent strength of the evidence at trial, therefore, it would result in the arbitrary denial of that right to a significant percentage of actually innocent defendants.

Presumably for that reason, of the 44 States with DNA testing statutes, only three even arguably allow a court to consider the probability that a favorable test result *would actually occur* in determining whether to grant access. See U.S. Br. 22-23. All of the other States and the federal government instead frame the standard in terms of the probability that a favorable test result *would cast doubt on the prisoner's guilt*. See, *e.g.*, 18 U.S.C. 3600(a)(8) (requiring applicant to show that "[t]he proposed DNA testing * * * may produce new material evidence that would * * * raise a reasonable probability that the applicant did not commit the of-

fense"); cf. U.S. Br. 26 (conceding that "the federal DNA statute does not look to whether the results of [the] requested testing would likely be favorable or unfavorable to the applicant"). For the same reason, the inquiry under the Due Process Clause should focus on the germaneness of a favorable test result. And where, as here, the prisoner was convicted of rape and seeks to test a condom that was used in the rape, that germaneness standard is plainly (and, in this case, concededly) met.

b. Petitioners also suggest (Br. 52) that, if this Court were to recognize that their conduct in this case violated due process, it would necessarily invalidate limitations on postconviction access that Congress and many state legislatures have incorporated into their DNA testing statutes. That suggestion, too, is unfounded.

As a preliminary matter, respondent is not asking this Court to invalidate any restriction that Alaska's legislature has placed on postconviction DNA testing; to the contrary, it is the *absence* of any statutory vehicle to override petitioners' arbitrary decision to bar access that gives rise to his claim. Because no State has a statute *prohibiting* the provision of access to evidence for DNA testing, a ruling in respondent's favor would not require the invalidation of any statute. See pp. 44-45, *supra*.

More broadly, respondent's claim does not implicate any of the "reasonable parameters and limitations" on the right of access found in DNA testing statutes. Br. of California et al. 13. Petitioners themselves contend that, should the Court agree that there is a due process right of access to evidence for DNA testing, the federal Innocence Protection Act, 18 U.S.C. 3600, "serves as a paradigm for the imposition of reasonable limits on that right." Br. 53. And as petitioners (Br. 51) and the United States (Br. 22) note, the Innocence Protection Act served as a model for many of the state statutes that

are currently in effect. Notably, however, petitioners and the United States fail to identify a single one of the Innocence Protection Act's requirements that respondent has not satisfied (except for the requirement that the applicant assert "under penalty of perjury" that he is actually innocent of the offense, 18 U.S.C. 3600(a)(1)—a requirement that respondent simply has not *had* to fulfill to date in this litigation).[20]

The United States suggests (Br. 24-25) that respondent should not be entitled to access to the evidence because he forwent RFLP testing at trial. It is undisputed, however, that the STR testing that respondent now seeks was unavailable at the time of trial and represents a substantial advance over RFLP, particularly in light of the development of CODIS. See pp. 4-5, *supra*. Indeed, for that reason, respondent would satisfy any relevant requirements of the Innocence Protection Act. See 18 U.S.C. 3600(a)(3)(A)(i) (permitting testing of evidence that was not previously subject to testing where the applicant did not "knowingly and voluntarily waive the right to request DNA testing" after the Innocence Protection Act's enactment); 18 U.S.C. 3600(a)(3)(B) (permitting retesting of evidence where the applicant wishes to use a testing method that is "substantially more pro-

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[20] The United States faults respondent (Br. 26) for filing an affidavit in the state postconviction proceedings that was "oddly worded and not a ringing affirmation of his innocence." Even if that "odd[] word[ing]" could somehow be construed as tantamount to an admission of guilt (notwithstanding respondent's assertion in the affidavit that he has "always maintained [his] innocence," J.A. 226), or if respondent's statements to the parole board were taken into account, respondent would still satisfy the requirements of the Innocence Protection Act, which permits an applicant who has previously "admitted" his guilt to seek DNA testing upon asserting his innocence in the prescribed manner. See 18 U.S.C. 3600(a)(1) and (6).

batives" than the prior one). And to the extent that United States relies on respondent's failure to seek RFLP testing at trial as evidence that respondent "engaged in strategic behavior that does not appear to be consistent with actual innocence" (Br. 25 n.3), that contention is belied by the evidence that respondent wanted to pursue further testing but was prevented from doing so by defense counsel. See p. 9, *supra*. In sum, because respondent could satisfy any reasonable requirement for a constitutional access-to-evidence claim, he is entitled to relief.

Finally, because Alaska is one of the few jurisdictions that do not have DNA testing statutes, the Court need not address any issue concerning the interplay between statutory rights of access and any constitutional right of access. Specifically, the Court need not consider whether a prisoner is required to exhaust statutory remedies before proceeding with a federal constitutional claim; whether any determinations made in statutory proceedings would have preclusive effect in subsequent federal proceedings; and whether (and, if so, how) the existence of statutory remedies informs the analysis of the federal claim. All that the Court need hold in this case is that Alaska's refusal to permit access to the evidence, in the absence of any statutory mechanism for obtaining it, offends due process.

* * * * *

One should not lose sight of the fact that, as in many of the Court's cases involving issues of great constitutional moment, this case ultimately concerns the efforts of one person: a man who has spent more than a decade fighting for access to the evidence for a simple DNA test that could prove his innocence, as similar tests have done for scores of other individuals who have been wrongfully

convicted. Although the State has belatedly conceded that a favorable DNA test result would in fact prove respondent's innocence, it continues steadfastly and arbitrarily to deny him the opportunity to obtain testing. One need not believe in a "living Constitution" to realize the inequity of that result. Instead, one need only apply this Court's well-established due process jurisprudence to the novel factual context resulting from recent transformational developments in forensic science. That jurisprudence dictates affording respondent the opportunity, at no cost to the State, to engage in DNA testing that could conclusively establish his innocence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The Ninth Circuit has recognized a postconviction constitutional right to on-demand access to forensic evidence. In support of that ruling, Osborne's amici recount compelling stories of miscarriages of justice. But those stories are not Osborne's story. The State is not seeking to keep an innocent man in jail. Instead, the State has a strong interest in not casting needless doubt on its final criminal judgments and in not wasting its resources dealing with a flood of meritless prisoner requests. A State may reasonably re-

serve postconviction DNA testing for those prisoners who, quite unlike Osborne, have steadfastly maintained their innocence, have not confessed to their crimes, and never had an opportunity to pursue advanced DNA testing at trial. There is neither a settled tradition nor widespread contemporary practice in this country, *see Medina v. California*, 505 U.S. 437, 445-48 (1992), of allowing prisoners to reopen criminal investigations on demand. Because the Ninth Circuit was wrong to discern such a right "under the open-ended rubric of the Due Process Clause," *id.* at 443, and because § 1983 was never the proper vehicle for asserting it, the judgments below should be reversed.

ARGUMENT

I. OSBORNE CANNOT USE § 1983 AS A DISCOVERY DEVICE FOR A YET UNASSERTED ACTUAL-INNOCENCE CLAIM

Osborne seeks to collaterally attack his state convictions by proving his actual innocence, and postconviction DNA testing is the means by which he hopes to accomplish that goal. J.A. 24-25, 36-37. But Osborne may not use § 1983 to discover evidence needed to support a claim within the exclusive realm of habeas. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). To hold otherwise, as the Ninth Circuit did, would permit piecemeal litigation of federal habeas claims and, when prisoners intend to use the evidence to pursue state remedies, would sidestep state discovery rules and postconviction procedures.

Osborne admits seeking discovery of DNA evidence to support an actual-innocence claim. Resp. Br. 2. In fact, the cornerstone of his due-process argument is

his alleged liberty interest "in freedom from confinement" or "in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." Resp. Br. 27, 32. Osborne does not dispute that an actual-innocence claim—like the one to which the requested discovery relates—falls within the core of federal habeas. Resp. Br. 18-25. A claim that one's conviction is invalid and must be vacated in the face of evidence establishing actual innocence (whether or not the claim is ultimately valid) is "an attack by a person in custody upon the legality of that custody." *Preiser*, 411 U.S. at 484. If Osborne asserts that claim in federal court, he must do so in a federal habeas action.

This fundamental connection between the discovery Osborne seeks and the substantive claim to which it relates forms the core of the State's argument. Pet. Br. 21-26. Permitting Osborne's piecemeal-litigation strategy would transform § 1983 into a discovery device that would allow parties to circumvent discovery rules and avoid threshold issues that normally precede discovery. Osborne fails to address this aspect of his strategy or cite any precedent to support his reading of § 1983. Resp. Br. 18-25.

Instead, Osborne focuses on matters that are either irrelevant or wrongly analyzed. Resp. Br. 18-25. For example, Osborne suggests that a stand-alone access-to-evidence claim could not be brought in federal habeas. Resp. Br. 21. But that misses the point. Discovery should be treated as discovery; it cannot be asserted in an action separate from the substantive claim to which it relates. Pet. Br. 21-23. To seek discovery in federal court, Osborne must first assert a substantive federal claim. *See Houston Business Journal, Inc. v. Office of the Comptroller of Currency*,

86 F.3d 1208, 1213 (D.C. Cir. 1996) ("The federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others.").

Osborne responds that discovery is discretionary in federal habeas actions. Resp. Br. 23-24. This statement is true as far as it goes. *See* Rule 6(a), Rules Governing Section 2254 Cases; *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). But when a prisoner states a prima facie claim for habeas relief, "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969). Under this standard, if Osborne asserts a valid claim for federal habeas relief and if DNA testing is relevant to that claim, then he could seek access to the DNA evidence under Rule 6(a). In fact, *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992), *required* the discovery of DNA evidence to a petitioner who had asserted a gateway-innocence claim. Although *Thomas* went beyond what was necessary to vindicate this discovery interest, the decision places in perspective Osborne's objection to the adequacy of discovery in federal habeas actions.

Osborne's real complaint is not that discovery is discretionary, but that it must proceed in an orderly fashion. Discovery does not begin until the petitioner has established a prima facie claim. *See, e.g.*, *Harris*, 394 U.S. at 290 (district court may order discovery when "confronted by a petition for habeas corpus which establishes a prima facie case for relief"). Requiring the assertion of a prima facie claim allows the court to determine what evidence will be material as well as the procedure for the orderly discovery of that evidence. *See Bracy*, 520 U.S. at 904 (in reviewing

the denial of a habeas petitioner's discovery request, this Court had to identify the "essential elements" of the substantive claim for relief before it could determine the existence of good cause for the requested discovery). It also protects States from the burdens of discovery in response to frivolous or procedurally barred habeas claims.

But therein lies the rub for Osborne. This Court has never recognized a stand-alone habeas claim of actual innocence. *See House v. Bell*, 547 U.S. 518, 554-55 (2006). And Osborne has alleged no independent constitutional errors that would support a gateway claim of actual innocence. Pet. App. 19a. If Osborne is bound by orderly process—if he must assert a prima facie claim before discovery—then his request will fail because he has no substantive federal claim to which the discovery would relate.

To avoid this dilemma, Osborne now asserts that he does not intend to file a federal actual-innocence claim. Resp. Br. 22-23. Instead, he intends to pursue state remedies. *Id.* This change in tack does not advance Osborne's argument; it merely highlights the federalism concerns addressed in the State's brief. Pet. Br. 24-26.

For example, if Osborne intends to use the DNA evidence to support a postconviction claim in state court, then he is asking the federal court to trump state discovery rules. Alaska law applies the civil discovery rules in postconviction-relief actions. *See* Alaska R. Crim. P. 35.1(g). Under those rules, a party "may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action." Alaska R. Civ. P. 26(b)(1).

But Osborne has not alleged a claim that would trigger discovery. In his state postconviction-relief action, Osborne argued that his counsel was ineffective, and he sought DNA testing to prove prejudice from his counsel's actions. Pet. App. 97a. His requests were denied because he did not allege a prima facie claim that his counsel's actions were ineffective. *Id.* at 100a-02a. Therefore, the issue of prejudice was moot. *Id.* Osborne then argued that he needed the testing to support a future claim based on newly discovered evidence. *Id.* at 103a. But the Alaska court believed that Osborne likely could not meet the statutory requirements for asserting a claim of newly discovered evidence. *Id.* at 104a-05a, 109a-10a. And until Osborne asserts a prima facie claim for relief, discovery is unnecessary.

The Alaska Court of Appeals, however, also recognized the possibility that a prisoner might pursue an actual-innocence claim under the state constitution even if he could not meet the statutory requirements for postconviction relief based on newly discovered evidence. Pet. App. 104a-11a. But Osborne asserted no such claim for relief; instead he asked for discovery without asserting such a claim. Drawing on examples from other States, the court devised a three-part test for determining when a prisoner is entitled to discover DNA evidence before asserting a substantive claim of innocence. *Id.* at 110a-12a. Osborne failed that test. *Id.* at 75a-82a. Most important, the Alaska court found that Osborne could not show that favorable testing would conclusively establish his innocence. *Id.* at 78a-82a. Further testing of the semen in the condom found at the scene might exclude him as the source of the material, but would not conclusively establish his innocence because it could not rule out the possibility

that the condom recovered at the scene was not the one used to commit the rape. *Id.* at 78a-79a. To establish that fact, epithelial cells on the outside of the condom would have to be tested–a fact that Osborne raised only in passing in the Alaska courts.

Osborne has not challenged the reasonableness of the Alaska courts' rulings. Instead, with only a passing nod to the state courts, Osborne bases his § 1983 claim on an informal, essentially over-the-counter, request he made to the District Attorney's Office. J.A. 36-37; Pet. App. 8a. But when that request was made, the District Attorney was opposing counsel in Osborne's state postconviction action, and the state court had already denied his request for testing. *Id.* Osborne's § 1983 complaint essentially asked the federal court to superintend discovery in the state court. The implications of such an approach to the state-federal balance are profound.

Osborne also suggests that he will use the evidence to pursue a clemency petition. Resp. Br. 23. Under Alaska law, "[i]f a prisoner relies on a particular basis recognized by the state as a potential ground for clemency, the prisoner must have a fair opportunity to make a factual showing that the ground has been satisfied." *Lewis v. State, Dep't of Corrections*, 139 P.3d 1266, 1270 (Alaska 2006). But Osborne has not requested clemency. Instead, he is asking the federal court to intervene in, and set procedures for, a not-yet-initiated state clemency proceeding, thereby eliminating the State's right to determine in the first instance what evidence will be provided to a prisoner who seeks clemency.

In identifying possible state remedies, Osborne has perhaps revealed his true intentions. In particular, he identifies "prosecutorial consent" as a possible

form of state relief. Resp. Br. 23. Osborne notes that in 88% of cases in which postconviction DNA testing is exonerative, no further litigation is required to obtain the petitioner's release; release is the product of the prosecutor's consent to vacate the conviction. *Id.* This process has always been the subtext of Osborne's case. Pressure brought to bear on a prosecutor through a well-planned publicity campaign may achieve Osborne's goals regardless of whether testing conclusively establishes innocence or merely casts doubt on guilt. Osborne thus acknowledges that a separate action may be unnecessary to secure his release. *Id.* That is, the discovery claim is sufficient by itself to cause his release. Under this analysis, the discovery claim falls squarely within the core of federal habeas.

Finally, Osborne disputes the State's interpretation of *Wilkinson v. Dotson*, 544 U.S. 74 (2005). Resp. Br. 24-25. According to Osborne, the State is arguing that his discovery claim must be asserted in a habeas action because his ultimate purpose is to challenge his confinement, and Osborne asserts that *Dotson* rejected this type of "but for" test. Resp. Br. 24. But the State is not arguing that Osborne's "ultimate purpose" should determine whether the claim must be brought in habeas. Although Osborne's "ultimate purpose" is relevant, it is the closeness of the connection between that purpose and the § 1983 claim that is decisive. This is the distinction between *Dotson*—where prisoners asserted outcome-neutral procedural claims, the success of which would, at most, provide the prisoners with new or earlier parole hearings and would not assure their release—and *Edwards v. Balisok*, 520 U.S. 641, 646-48 (1997)—where the prisoner's claim was not outcome-neutral, because proof of alleged bias and egregious misconduct of a hearing

officer would, if successful, "necessarily imply the invalidity of the punishment imposed." *Id.* at 648.

Osborne implicitly concedes this connection between testing and release: according to Osborne, release often occurs without the prisoner's having to file a separate action after exonerative results. Resp. Br. 23. In short, while the final test will occur in a laboratory, the die will be cast by the ruling on the discovery claim. Further action to set aside the conviction, to the extent such action is needed, would be *pro forma*.

II. OSBORNE DOES NOT HAVE A RIGHT OF ACCESS TO THE DNA EVIDENCE INDEPENDENT OF A MECHANISM FOR POSTCONVICTION RELIEF

Osborne's due-process arguments can be distilled to a single question: If it costs the State nothing, why not test? But it does not cost the State nothing. The State's interest in limiting meritless attacks on its criminal judgments—sometimes referred to as "finality"—is no mere abstraction. Beyond the victims' interests, *see generally* Br. of K.G. and Crime Victims Institute, there is the State's need to husband the resources that must be expended in reviewing, processing, and (when necessary) litigating these requests. And those burdens—which are borne by prosecutors' offices, crime laboratories, and courts—increase when the standards for requesting testing are set so low as to encourage gamesmanship by prisoners with no valid claim of innocence but nothing to lose by requesting testing. Furthermore, as the various statutes regulating DNA testing in other States reflect, States have an interest in ensuring that postconviction claims are heard by the court in which the criminal trial itself took place—the court most famil-

iar with the record and best able to appreciate the significance of any new evidence.

States thus have a strong interest in setting reasonable limits that focus state resources on cases in which testing is most likely to result in exoneration. Alaska has procedures that allow this type of screening, and the constitutionality of those procedures is unchallenged. Alaska cannot be faulted for insisting that Osborne follow these procedures.

A. Osborne Has Only a Limited Liberty Interest Based on the State-Created Procedures Available to Him

Due process protects from arbitrary government action "a substantive interest to which [an] individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). Thus, in resolving a due process claim, one must first determine whether state action has "infringed or implicated a 'liberty' interest . . . within the meaning of the Due Process Clause." *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976).

The Ninth Circuit created a stand-alone postconviction right to discover evidence but failed to identify the liberty interest served by this due process right. Pet. App. 15a-23a. Osborne does not fill this gap. Instead, he identifies meaningful access to state postconviction relief as his liberty interest.[1] Resp. Br. 27-31. But meaningful access is not itself a liberty interest; "[p]rocess is not an end in itself." *Wakinekona*, 461 U.S. at 250. Rather, meaningful

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[1] In casting his asserted liberty interest solely in the context of state remedies, Osborne has seemingly abandoned a potential freestanding claim of actual innocence in federal court as a basis for seeking the evidence in question. *See* Resp. Br. 30-31.

access secures an individual's ability to redress the deprivation of a liberty interest. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (right of access to courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court").

Thus, Osborne must look elsewhere for a liberty interest. First, Osborne hints at a broad liberty interest in freedom from unjust confinement. Resp. Br. 27, 32. But a conviction after a fair trial "extinguishe[s]" this liberty interest. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (citing *Meachum*, 427 U.S. at 224). Second, Osborne points to state-created mechanisms for postconviction relief. Resp. Br. 29-31. A State may create a liberty interest by establishing substantive, mandatory criteria that govern official decision-making. *See Kentucky, Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989).

It is this latter form of liberty interest—created by States themselves—on which Osborne's due process claim must stand or fall. In Alaska, a prisoner may pursue postconviction relief through a court proceeding or a request for executive clemency. But Osborne cannot rely on executive clemency to create a liberty interest. Because executive clemency is discretionary, it gives rise at most to a residual interest that requires only "*minimal* procedural safeguards," *i.e.*, protection against random action.[2] *Ohio Adult*

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[2] Osborne's amici argue for a broader liberty interest in clemency for prisoners who can conclusively establish their innocence. Br. of Eleven Individuals 23-28. But amici offer little to support a protected expectation in a form of relief that has traditionally been left entirely to executive discretion. And even if there were some added liberty interest, amici fail to

Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring); *but see id.* at 280-82 (Rehnquist, C.J.) (plurality opinion) (prisoner has no liberty interest in clemency). More important, even if there is a liberty interest based on state-created remedies, Osborne cannot show that Alaska's procedures are constitutionally deficient.

B. Alaska Law Provides Access to Evidence Needed to Support a Claim for Postconviction Relief

Osborne's brief is almost devoid of any discussion of the procedures available under Alaska law. But any analysis of Osborne's meaningful-access claim must begin with a review of the access available under state law. *See Parratt v. Taylor*, 451 U.S. 527, 542 (1981) ("the existence of an adequate state remedy . . . avoids the conclusion that there has been any constitutional deprivation"). There are at least three avenues by which Osborne could seek state postconviction relief based on actual innocence—assuming that he could meet the relevant procedural requirements. These include: (1) a court action for postconviction relief under Alaska Statute 12.72; (2) pre-claim discovery under the three-part test adopted by the Alaska Court of Appeals in Osborne's state proceeding (Pet. App. 110a); and (3) executive clemency under the Alaska Constitution, article III, section 21.[3]

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explain how that interest gives Osborne a right to obtain evidence *before he submits a clemency petition*.

[3] In its opening brief, the State identified another form of postconviction relief: an administrative petition for discretionary parole. Pet. Br. 46. Osborne does not mention this option in his brief. Resp. Br. 29-30.

Each of these avenues provides a mechanism by which deserving applicants may obtain access to evidence to support a claim of actual innocence. The traditional rules of civil discovery apply to court proceedings for postconviction relief under Alaska Statute 12.72. *See* Alaska R. Crim. P. 35.1(g). Similarly, the Alaska Court of Appeals has recognized a limited right to pre-claim discovery if the prisoner can show "(1) that their conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." Pet. App. 110a. Finally, state clemency investigations must provide petitioners "a fair opportunity to make a factual showing" to support a clemency request. *See Lewis*, 139 P.3d at 1270. These avenues remain available to Osborne, although they do not necessarily guarantee the result Osborne seeks.

In addition, the Ninth Circuit speculated that "the Alaska Constitution might require court intervention if a defendant were to present" a strong DNA-based case of actual innocence, despite procedural default under the statutory postconviction procedures. Pet. App. 19a (citing Pet. App. 89a). Even if such speculation is legitimate, there is no reason to doubt that an Alaska court would adopt discovery procedures similar to those that apply to claims under Alaska Statute 12.72. *See Lewis*, 139 P.3d at 1270.

C. Osborne Has Not Invoked and Been Denied Discovery Under the State Procedures Available to Him

Although the Ninth Circuit based its ruling on an extension of a prisoner's pretrial right to exculpatory evidence (Pet. App. 15a-23a), Osborne takes a differ-

ent approach, arguing that the District Attorney's refusal to grant him informal access to the DNA evidence denied him meaningful access to state postconviction relief. Resp. Br. 27-31. But a meaningful-access claim depends not on whether the State has refused to provide something an individual believes is needed to pursue legal relief, but on whether there exist constitutionally adequate means to pursue relief in a meaningful fashion; the focus is on the procedures actually available. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996).

Here, Osborne has not asserted an actual-innocence claim in the state courts, filed a petition for clemency, or requested discovery through those state-provided mechanisms. While those state mechanisms do not guarantee him access to the DNA evidence, Osborne cannot show that the pre-claim denial of his informal request for DNA testing precluded him from seeking relief under those state procedures. In short, because he has not invoked the state-provided mechanisms, he has not been denied meaningful access. *See Lewis*, 518 U.S. at 351-53 (meaningful-access claim requires prisoner to establish actual injury by demonstrating that alleged shortcomings in process "hindered his efforts to pursue a [nonfrivolous] legal claim"); *Harbury*, 536 U.S. at 415 (constitutional right of access to courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court").

The State acknowledges that Osborne filed a state-court action for postconviction relief in which he sought access to the DNA evidence. *See* Pet. App. 63a-90a, 97a-112a. But Osborne did not assert an actual-innocence claim in that action. And he did not present a persuasive argument for pre-claim access to

evidence under the state court's three-part test. Instead, he focused on the semen and hair, which could not conclusively establish his innocence. Pet. App. 78a-79a; J.A. 220-21. Though he mentioned the epithelial cells in the state courts, he did not pursue their significance.[4] And Osborne did not challenge the three-part test adopted by the Alaska court for pre-claim discovery. Osborne's opportunity for federal review of that standard would have been certiorari review in this Court, which he did not seek, and he cannot now relitigate the merits of that test. *See Allen v. McCurry*, 449 U.S. 90, 103 (1980) ("a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court . . . cannot lie in the Constitution . . . [a]nd no such authority is to be found in § 1983 itself"); *accord San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 343 (2005).

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[4] Osborne complains of the timing of the State's concession that new DNA testing could conclusively establish his innocence. Resp. Br. 52. But Osborne mentioned the epithelial cells only in passing in the state courts—in an affidavit submitted by his attorney and as support for an unrelated argument concerning an alleged waiver by the State. More important, his focus in the federal litigation was solely on the semen and hair. It was not until the second argument before the Ninth Circuit that Osborne explicitly argued to a federal court the potential effect of testing the epithelial cells. Once Osborne pressed that issue, the State recognized that testing both the epithelial cells and the semen carried the potential of conclusively establishing Osborne's innocence and candidly conceded that fact. More important, Osborne misstates the State's concession, asserting it has conceded that new testing would conclusively establish his innocence." Resp. Br. 16, 30, 45 (emphasis added). But the State has conceded only the possibility of exoneration. Cert. Rpy. 8.

Because Osborne did not present his current postconviction claim to the state courts, his earlier postconviction-relief case cannot be considered an invocation of state postconviction-relief procedures, nor can the resolution of that case against Osborne be cited as a failure on the part of the State to provide Osborne with meaningful access to such relief.

D. Procedural Due Process Does Not Require the State to Provide Pre-Claim Discovery of DNA Evidence

Because Osborne has not yet invoked any state-created postconviction mechanism, his assertion that he has been denied meaningful access is premature. Osborne nevertheless argues that his inability to obtain evidence *before* asserting a claim for postconviction relief interferes with meaningful access to those remedies. Resp. Br. 31-39. But the State's insistence that Osborne follow the rules does not violate due process.

1. Osborne does not satisfy the applicable due process standard of *Medina v. California*

Osborne contends that *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the method for analyzing his procedural due-process claim. Resp. Br. 31-36. But *Mathews* "does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." *Medina v. California*, 505 U.S. 437, 443 (1992). Expanding the guarantees of fair criminal procedure "under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Id.*; *see also Smith v. Robbins*, 528 U.S.

259, 274-75 (2000) (emphasizing broad leeway given to States in determining how to handle post-conviction proceedings); *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment) (same).

In matters of criminal procedure, this Court "exercis[es] substantial deference to legislative judgments" and asks only whether a State has "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445-46 (internal quotation marks omitted). "[I]t is not the role of the courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis*, 518 U.S. at 349. Thus in *Herrera v. Collins*, 506 U.S. 390, 407-17 (1993), this Court used a *Medina*—not a *Mathews*—analysis to evaluate a claimed due-process right to assert "actual innocence" in postconviction proceedings.

Osborne is demanding (as Herrera was) a supplement to the established procedures for ascertaining the truth at trial. And, as the State and the United States have explained, Osborne's demand directly implicates (as Herrera's did) the considerations supporting a legislature's decision whether to furnish a particular additional safeguard against a wrongful conviction. *See* Pet. Br. 49-52; U.S. Br. 17-24. Osborne's statement that he is not "seeking micromanagement of criminal procedure under the guise of 'due process,'" Resp. Br. 37, is simply wrong: the Ninth Circuit's ruling accomplishes precisely that, thus violating this Court's injunction against "'intrud[ing] upon the administration of justice by the individual States.'" *Medina*, 505 U.S. at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

Moreover, although Osborne's amici cite cases of exoneration as proof of the need for federal oversight, there is no indication that federal courts played a role in those cases. Those cases show only that *state* procedures have led to appropriate grants of clemency by *state* officials. They hardly constitute a clarion call for *federal* intrusion into these state matters.

Osborne fails the *Medina* test. Osborne concedes that there is no "settled tradition" of granting the relief he seeks. Resp. Br. 37. He tries to explain away this problem because DNA testing "did not even exist until twenty years ago." *Id.* But as the United States explains, there is no "settled tradition" in this country of granting on-demand postconviction access to *any* physical evidence, many kinds of which have been used for decades to convict individuals. *See* U.S. Br. 16.

Osborne responds that, if "history and tradition" are defined at a sufficiently general level, *Medina* is satisfied because "the core objective of our criminal justice system" is to convict the guilty and free the innocent. Resp. Br. 37. But "'[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'" *Medina*, 505 U.S. at 451 (quoting *Patterson*, 432 U.S. at 208). Osborne also argues that the "contemporary practice" component of a *Medina* inquiry, *see* 505 U.S. at 447-48; *Herrera*, 506 U.S. at 410-11, works in his favor. Resp. Br. 38. But that is not true. Forty-six jurisdictions have enacted DNA testing statutes, but, as even Osborne's amici acknowledge, *see* Br. of Current and Former Prosecutors 21-26, he would not qualify for testing under many of them. *See also* U.S. Br. 17-24; Br. of 31 States 3-13.

Osborne's final *Medina* argument is that "fundamental fairness" works in his favor because the State has "fail[ed] to articulate *any* valid interest" supporting its position. Resp. Br. 38. But the State has articulated several interests, including expending scarce resources available for DNA testing on only the most promising cases and not allowing prisoners to game the system. *See* Pet. Br. 36, 50, 52, 53; *see also* Br. of 31 States 6-7. Those interests are no less "valid" than the interests accorded respect in *Schlup v. Delo*, 513 U.S. 298, 324 (1995), *McCleskey v. Zant*, 499 U.S. 467, 493 (1991), and *Williams v. Taylor*, 529 U.S. 362, 386, 404 (2000), all of which limited collateral challenges to States' presumptively valid criminal judgments.

2. Osborne's claim would fail even under *Mathews v. Eldridge*, if it applied

Even if the *Mathews* test applied—which it does not—Osborne's claim would fail. *Mathews* considers: (1) the private interest affected by official action, (2) the risk of erroneous deprivation of that interest through use of available procedures and the probable value of additional procedural safeguards, and (3) the government's interest, including the burdens that any additional procedures might impose. *Mathews*, 424 U.S. at 335. Viewed in the light of the post-conviction procedures available to Alaska prisoners, the *Mathews* balance tips decidedly in the State's favor.

Osborne defines his interest as the "almost uniquely compelling" interest in the accuracy of the criminal proceeding that resulted in his imprisonment. Resp. Br. 32 (citing *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985)). But *Ake* was a pretrial case. By contrast,

"federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera*, 506 U.S. at 400. Thus, any interest in accuracy that survives a fair trial is minimal. *See Greenholtz*, 442 U.S. at 7 (conviction after fair trial "extinguishe[s]" prisoner's pretrial liberty interest).

Osborne's analysis of the risk of erroneous deprivation of his personal interest misses the mark for two reasons. First, he claims that this risk stems from an absence of a "*statutory mechanism* for obtaining access to the evidence for DNA testing." Resp. Br. 32-33 (emphasis added). But Osborne cites no authority for the proposition that procedural protections must be statutory or specific to DNA evidence. Second, Osborne fails to account for the procedures that are available to him. *See, supra*, pp. 12-13 (discussing available remedies for prisoner who has made a prima facie case). In light of the availability of these procedures, Osborne fails to identify any substantial risk of erroneous deprivation. That is, Osborne has not explained why he must have access to the evidence *before* he asserts a prima facie claim for relief, in addition to the state-created procedures available to him after he has asserted such a claim.

Finally, Osborne attempts to define the State's interest as merely a "generic interest in the finality of criminal convictions." Resp. Br. 33. The State does not rely solely on its "indisputable interest in finality." *Harvey v. Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (Luttig, J., opinion respecting denial of rehearing *en banc*). The State has never claimed that access should be denied in all circumstances. But when a prisoner seeks to attack a fairly obtained conviction on the ground of actual innocence, the State has a

strong interest in screening out claims that clearly lack merit and devoting its resources to those claims that are extraordinary. *Cf. Herrera*, 506 U.S. at 417 (assuming threshold showing for claim of actual innocence "would necessarily be extraordinarily high"). The concern for state resources is substantial. The problem of DNA backlogs at crime laboratories implicates not merely the ability to address post-conviction innocence claims but also the investigation and prosecution of crimes in the first instance. *See* National Institute of Justice, National Forensic DNA Study Report, Executive Summary (2003) (providing statistics on backlogs and impact on criminal justice system).[5] In addition, the State has a strong interest in ensuring that claims are resolved in accordance with the orderly process defined by the legislature and the courts. These interests support the types of requirements imposed by Alaska, other States, and Congress.[6]

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[5] This report is available online at http://tinyurl.com/NatlForensicDNAStudy (last visited February 17, 2009).

[6] Osborne suggests that the Ninth Circuit's decision will not affect DNA statutes in other jurisdictions. Resp. Br. 51. But many of those statutes would deny Osborne the testing he seeks. To the extent the Ninth Circuit would require testing that is otherwise precluded under state law, that decision renders those laws invalid. And any limits imposed by those laws could be sidestepped by filing a § 1983 action. Indeed, the amicus brief of current and former prosecutors encourages such sidestepping. After proclaiming in a heading on page 20 that recognizing a constitutional right "Would Not Affect the State Statutory Mechanisms Currently In Place," amici on the next page acknowledge that several state statutes would *not* provide Osborne relief and decry their criteria as "arbitrary line-drawing" that they say the Constitution should override.

Osborne attempts to divert attention from the State's legitimate interests by asserting that, as far as his attorneys are aware, "[Alaska] is the only one of those States [without a DNA testing statute] that has not conducted a single postconviction DNA test pursuant to court order or consent." Resp. Br. 38. That statement is proof of nothing because Osborne provides no information on how many requests have been made to the State. The absence of DNA testing could reflect nothing more than the State's relatively small prison population and the lack of any requests in which DNA testing had the potential to conclusively establish innocence.[7]

E. Osborne Cannot Avoid State Procedural Requirements By Independently Requesting Evidence from the District Attorney

The District Attorney's denial of Osborne's informal request for evidence does not change this analysis because that denial had no effect on Osborne's purported liberty interest. *Cf. Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (Circuit Attorney "unconscionably interfere[d]" with state-created clemency process by inducing subordinate to withhold from governor information favorable to pending clemency petition). Osborne has put the cart before

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[7] Osborne's assertion that no requests for testing have been granted is not based on the record before this Court. Moreover, counsel for the State has been able to identify only seven requests (including Osborne's), most of which were made in the context of court proceedings. Most are still pending, but one was granted by the state court (although no testing occurred because the evidence had already been destroyed). *See Patterson v. State*, 2006 WL 573797 (Alaska Ct. App. Mar. 8, 2006) (unpublished).

the horse by suggesting that the District Attorney could interfere with postconviction procedures *before* Osborne has even invoked them. "It is for the courts to remedy *past or imminent* official interference with individual inmates' presentation of claims to the courts." *Lewis*, 518 U.S. at 349 (emphasis added). Thus, with no evidence that the District Attorney's decision affected Osborne's ability to make meaningful use of Alaska's postconviction-relief mechanisms, there is nothing to analyze under either *Medina* or *Mathews*.

Osborne offers no adequate explanation why a direct request to the District Attorney should be the exclusive means for securing meaningful access to state postconviction procedures in the absence of a statute providing for DNA access. The absence of a specific statute, he asserts, means that "no meaningful procedural safeguards" exist to ensure against the erroneous deprivation of his purported liberty interest. *See* Resp. Br. 33. But, as noted above, state post-conviction mechanisms incorporate procedures through which he could seek access to the DNA evidence. And Osborne offers no authority that meaningful procedural safeguards can be provided only by statute. One need look no further than *Brady v. Maryland*, 373 U.S. 83 (1963), for an example of a judicially imposed procedural safeguard.

F. *Brady v. Maryland* Does Not Impose an Extrajudicial, Postconviction Right to Discovery from a Prosecuting Authority

The Ninth Circuit relied on *Brady* to create a stand-alone postconviction discovery right. Pet. App. 15a-16a. Osborne all but concedes that *Brady* does not create such a right detached from any substan-

tive claim for relief. *Compare* Pet. Br. 35-38 *with* Resp. Br. 39-41. Instead, he argues that there exists in the penumbra of *Brady* a transcendent right to discovery of any evidence that advances the truth-seeking function of the justice system. Resp. Br. 40-41. Because "truth is a fundamental goal of our legal system," *United States v. Havens*, 446 U.S. 620, 626 (1980), the application of such a shadowy principle would have virtually no limit.

The State shirks neither its dedication to the truth nor its duty to establish justice by insisting that a defendant follow the orderly procedures available for obtaining discovery of evidence. The point of Osborne's claim, however, is to avoid those procedures. Osborne does not seek due process; he seeks to avoid the process due.

G. *Arizona v. Youngblood* Does Not Support Osborne's Due Process Claim

Osborne cites Judge Luttig for the proposition that withholding evidence from a convicted defendant "for no reason at all" where that evidence could establish factual innocence comes "perilously close" to the bad-faith destruction of potentially useful evidence and should be prohibited. Resp. Br. 42 (quoting *Harvey*, 285 F.3d at 318 (Luttig, J.) (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988)). But the State action Osborne complains of does not fall within the concerns of *Youngblood*.

Youngblood affords a remedy only for destruction of evidence and only if the State acts in bad faith. Neither of these factors is present here. First, a refusal to provide access to evidence "is not the equivalent of destruction" because the evidence is preserved and could be tested if the prisoner "otherwise

had a right of access to the evidence." *Grayson v. King*, 460 F.3d 1328. 1338 n.6 (11th Cir. 2006). Second, a bad-faith requirement reasonably limits the duty to preserve evidence to those cases "where the interests of justice most clearly require it," *i.e.*, where the conduct by the police "indicate[s] that the evidence could form a basis for exonerating the defendant." *Youngblood*, 488 U.S. at 58. But as discussed previously, the State had ample reason to deny Osborne's ad hoc request to the District Attorney.

H. Osborne's Right to Substantive Due Process Was Not Violated Because the State's Denial of Osborne's Request for Access Was Not Arbitrary

Osborne argues that the State's decision to withhold access "rises to the level of conscience-shocking behavior" and, therefore, violates substantive due process. Resp. Br. 43. To support this argument, Osborne persistently mischaracterizes the State's position as stubborn and arbitrary. *See* Resp. Br. (I), 16, 18, 26, 28, 32, 33, 43, 45, 49, 52. But the State's position was neither arbitrary nor stubborn.

The only request for access at issue in this case is the request Osborne made directly to the District Attorney's Office. *See* J.A. 36-37 (¶39). Osborne apparently made this request *after* the Alaska Superior Court ruled that the State did not have to provide him access to the evidence and *after* he had initiated state appellate review of that ruling. *Id.*; Pet. App. 8a, 99a-100a. In fact, despite the pending litigation, Osborne made his request outside of any recognized procedure that would provide the necessary oversight to ensure the integrity of the evidence. The State thus had ample justification for refusing this type of informal, over-the-counter request.

The State does not dispute that in the truly extraordinary case—a case in which (1) the evidence could conclusively establish innocence, (2) there is substantial reason to believe that testing would be favorable to the prisoner, and (3) *state procedures have failed to correct clear injustice*—due process might support a federal right of access. But Osborne is essentially arguing that no restrictions, other than some limited showing of materiality, may be placed on postconviction access to DNA evidence. In fact, that is what he must argue, because he cannot meet even the most basic criteria adopted by States and the federal government: he has confessed his guilt rather than declared his innocence, and there is no reason to doubt his guilt. In this and many other respects, Osborne's case differs from the stories of misapplied justice set out in the amicus briefs filed on Osborne's behalf.

First, Osborne has not maintained his innocence. He confessed his guilt under circumstances that do not suggest coercion or other improper action by the State. Pet. App. 71a & n.11, 73a. While some of the prisoners mentioned by amici confessed, the confessions were usually pretrial, either to the police or as part of a plea agreement to avoid the death penalty. Nothing like that exists here. Other than his desire to get out of prison, there is no evidence that Osborne was under any of the inherent pressures that attend interrogation when he prepared his confession during the parole proceedings. For this reason, Osborne would fail even the standard set by Judge Luttig, who identified as a key component of a request for testing the fact that the defendant have "*steadfastly* maintain[ed] his factual innocence." *Harvey*, 285 F.3d at 319 (emphasis added).

Consistent with his confession, Osborne, unlike many of the prisoners mentioned by amici, has never affirmatively stated his innocence under oath. In the affidavit filed with the federal court, he merely stated that he had "always maintained [his] innocence," ignoring the confession he gave to the Parole Board less than two years earlier and mentioned in the same affidavit. J.A. 226. As if this were not enough to cast doubt on anything Osborne might say, he then confirmed that doubt by asserting that new testing "will prove once and for all time *either my guilt or innocence*." J.A. 227 (emphasis added).

Second, unlike many of the situations discussed by amici, Osborne's trial lawyer deliberately chose not to pursue more advanced testing. As the United States points out, "a decision to forgo testing at trial is plainly relevant if the Court must evaluate the interest that the government has in denying post-conviction testing to those who have engaged in strategic behavior that does not appear to be consistent with actual innocence." U.S. Br. 25 n.3.

Third, unlike many of the cases cited by amici, Osborne's conviction did not depend on a single eyewitness identification. Osborne was identified not only by K.G., but also by his codefendant, Jackson, who knew Osborne. J.A. 219; Pet. App. 98a. Osborne has offered no reason for disbelieving Jackson, who inculpated himself as well as Osborne. And circumstantial evidence supports K.G.'s and Jackson's accusations: Osborne's telephone calls to Jackson from the arcade before the rape, the testimony of witnesses who saw Osborne get into Jackson's car before the rape and saw Osborne and Jackson together shortly after the rape, arcade tickets found inside Jackson's car, the testimony of witnesses who saw blood on Os-

borne's clothing shortly after the rape, and Osborne's access to an axe handle similar to the one found at the crime scene and similar to the object K.G. described. J.A. 215-16.

Fourth, unlike many of the cases described by amici, DNA testing *was* performed in Osborne's case. Pet. App. 117a. That testing excluded Jackson (and his later passenger, Hunter) and identified Osborne as within the 14-16% of the population who could have been the source of the semen in the condom found at the crime scene. Pet. App. 5a, 117a. Although there is a remote possibility that a more discriminating test might yield a different result, that possibility does not negate the value of the testing that was performed.

All of this sets Osborne's case apart from the extraordinary cases that he and his amici cite. Osborne's case is not extraordinary, and it would not warrant relief under most of the procedures in place across the country. While there may be prisoners for whom postconviction testing is appropriate, it is reasonable for the State to conclude that Osborne is not one of them. Alaska (like most other States) has adopted a reasonable approach that provides adequate relief in deserving cases. While the Ninth Circuit might prefer a different approach, that difference of opinion is not grounds for federal intervention.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Alaska Statute 33.16.070 provides:

> The [parole] board or a member of the board may issue subpoenas and subpoenas duces tecum in the performance of board duties under AS 33.16.060(a). Subpoenas issued under this section are enforceable in Superior Court.

Alaska Statute 33.20.080(a) provides:

> The governor may not grant executive clemency to a person unless the governor has first provided notice of consideration of executive clemency to the board of parole for investigation and at least 120 days have elapsed since the notice required under (b) of this section has been provided. The board shall investigate each case and, not later than 120 days after receipt of the notice of consideration, submit to the governor a report of the investigation, together with all other information the board has regarding the person. When the report is submitted, the board shall also transmit to the governor the comments it has received under (b) of this section.

Alaska Rule of Civil Procedure 26(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The in-

> formation sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Alaska Rule of Civil Procedure 34(a) provides in part:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served[.]

Alaska Rule of Criminal Procedure 35.1 provides in part:

> (d) *Application—Contents.* The application shall (1) identify the proceedings in which the applicant was convicted, (2) state the date shown in the clerk's certificate of distribution on the judgment complained of, (3) state the sentence complained of and the date of sentencing, (4) specifically set forth the grounds upon which the application is based, and (5) clearly state the relief desired. . . . Facts within the personal knowledge of the applicant shall be set out separately from other allegations of facts and shall be under oath. Affidavits, records, or other evidence supporting

its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from the conviction or sentence including any previous applications for post-conviction relief. Argument, citations and discussion of authorities are unnecessary. Applications which are incomplete shall be returned to the applicant for completion.

* * *

(g) *Hearing—Evidence—Order.* The application shall be heard in, and before any judge of, the court in which the underlying criminal case is filed. An electronic recording of the proceeding shall be made. All rules and statutes applicable in civil proceedings, including pre-trial and discovery procedures are available to the parties except that Alaska Rule of Civil Procedure Rule 26(a)(1)–(4) does not apply to post-conviction relief proceedings. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. Unless otherwise required by statute or constitution, the applicant bears the burden of proving all factual assertions by clear and convincing evidence. The court may order the applicant brought before it for the hearing or allow the applicant to participate telephonically or by video conferencing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other mat-

ters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. The order made by the court is a final judgment.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
DEC 31 2008
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No. 08-6

In the Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL., PETITIONERS

v.

WILLIAM G. OSBORNE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question: Whether respondent has a right under the Fourteenth Amendment's Due Process Clause to obtain post-conviction access to the State's physical evidence.

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In the Supreme Court of the United States

No. 08-6

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL., PETITIONERS

v.

WILLIAM G. OSBORNE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

Respondent asserts a right under the Due Process Clause of the Fourteenth Amendment to obtain postconviction access to physical evidence used to convict him at trial for a brutal sexual assault. Because the Due Process Clause of the Fifth Amendment applies to defendants tried in federal courts, the United States has a significant interest in the disposition of this case. In addition, Congress has articulated the circumstances under which federal prisoners may secure postconviction DNA testing of evidence in the federal government's possession. See 18 U.S.C. 3600. This Court's decision could affect the validity of that statute.

STATEMENT

1. One evening in March 1993, respondent twice called his friend Dexter Jackson from the Space Station arcade. Pet. App. 65a; J.A. 215. Jackson drove to the Space Station, and respondent entered his vehicle. *Ibid.*

That same evening, a woman on foot, K.G., was approached by a car driven by Jackson. Pet. App. 113a; J.A. 64. After Jackson and his male passenger offered K.G. $100 to perform fellatio, J.A. 66, the men drove her to a secluded site, taking her Swiss Army knife from her on the way. Pet. App. 113a-114a. The passenger pointed a gun at K.G. and ordered her to disrobe. *Id.* at 114a. K.G. was forced to perform fellatio on Jackson, and the passenger, wearing a blue condom, raped her. *Id.* at 3a, 114a; J.A. 68-69. When K.G. refused the passenger's command to get out of the car and lie face down in the snow, Jackson struck her with the gun and the passenger choked her. Pet. App. 114a; J.A. 71-72.

When K.G. finally exited the car, both men brutally beat her with a wooden object. Pet. App. 114a-115a; J.A. 73-74. The passenger then fired a shot at K.G. Pet. App. 115a. The bullet grazed her skull, and she pretended to be dead. *Ibid.* The men buried her with snow and left her for dead. *Ibid.* After her assailants departed, K.G. flagged down a passing car and told its occupants she had been attacked by two black men with military haircuts. *Ibid.*; J.A. 216. Later that evening, respondent and Jackson (both African-Americans in the military) were seen together by multiple witnesses, some of whom noticed blood on respondent's clothing. *Ibid.*

Six days later, military police stopped Jackson's car. Pet. App. 116a; J.A. 97. A search of the car produced a .380-caliber semiautomatic pistol, a bottle of K.G.'s per-

fume, and tickets from the Space Station arcade. Pet. App. 67a, 116a; J.A. 215-216. K.G.'s Swiss Army knife was in Jackson's pocket. Pet. App. 116a. DQ-alpha (DQA) DNA testing of blood spots in Jackson's car matched K.G.'s DQA type, which is found in approximately 4.4 to 4.8% of white females. *Ibid.* Jackson confessed that he and respondent had attacked K.G. *Id.* at 4a. K.G. identified both Jackson and respondent. *Id.* at 116a-117a; J.A. 80-81, 214.

At the crime scene, investigators had discovered several sets of tire tracks, one of which matched the tires on Jackson's car, and an area of disturbed and blood-stained snow. Pet. App. 117a. In the snow, they located K.G.'s bloody pants, an axe handle similar to ones respondent used in his work and kept in his home, a .380-caliber shell-casing that ballistics testing matched to the pistol taken from Jackson's car, and a used blue condom. *Id.* at 4a-5a, 68a, 117a. Sperm in the condom did not match Jackson's DQA type, but did match respondent's, which is shared by about 14.7 to 16% of African-American males. *Id.* at 5a, 117a; J.A. 117-119, 217. Pubic hairs found on the condom and on K.G.'s sweater had the same microscopic characteristics as respondent's (but not Jackson's) pubic hair. J.A. 104-105, 108, 216-217.

2. Respondent and Jackson were tried jointly in Alaska Superior Court. Pet. App. 117a. Respondent presented a defense of mistaken identity, arguing in part that one-sixth of the African-American male population shared the DQA type found in the condom and could have been K.G.'s attacker. *Id.* at 70a. The jury rejected that defense and convicted respondent of kidnapping, assault, and two counts of sexual assault. *Id.* at 117a. He was given a composite sentence of 26 years of imprisonment, with five years suspended. *Id.* at 118a.

In 1996, the Alaska Court of Appeals affirmed respondent's convictions and sentence. *Id.* at 113a-130a.

3. a. Respondent filed a state postconviction petition, arguing, *inter alia*, that his trial counsel had been ineffective in failing to test the contents of the condom and the pubic hair found on K.G.'s sweater using the restriction-fragment-length-polymorphism (RFLP) method, a significantly more discriminating method of DNA testing than the DQA method.[1] Pet. App. 97a; J.A. 14. Respondent's lawyer submitted an affidavit explaining that she made a conscious decision not to seek RFLP testing before trial. Pet. App. 97a-99a. She believed the State's own test results failed to exclude a significant portion of the population and thus created a solid predicate for a mistaken-identity defense. *Id.* at 98a. Given the other evidence, including Jackson's confession (which could not be used against respondent at their joint trial under *Bruton* v. *United States*, 391 U.S. 123 (1968)), counsel believed a more sophisticated test would only have confirmed that respondent committed the crimes. Pet. App. 98a-99a; J.A. 18.

The state postconviction court found that counsel's strategic decision "to forego [*sic*] more precise genetic testing of physical evidence and to argue that the testing conducted by the State was inconclusive" was a reasonable one, and it therefore denied respondent's petition. J.A. 20. The court also denied respondent's motion to order retesting of the evidence using the short-tandem-repeat (STR) method (a newer, even-more-discriminating form of DNA analysis). J.A. 22, 38; Pet. App. 11a.

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[1] RFLP testing is generally several orders of magnitude more powerful than the DQA testing that was performed on the semen sample. See, *e.g.*, Eric S. Lander & Bruce Budowle, *DNA Fingerprinting Dispute Laid to Rest*, 371 Nature 735, 738 (1994).

b. The Alaska Court of Appeals affirmed in part. Pet. App. 91a-112a. The court upheld the lower court's finding that counsel's decision to forgo further DNA testing was a reasonable trial strategy. *Id.* at 100a-102a. The court also held that there is no federal due process right to retest evidence in order to attack a final judgment of conviction. *Id.* at 105a-109a. But the court suggested the Alaska Constitution might afford respondent an equivalent right if he could demonstrate "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning [his] identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." *Id.* at 111a.

c. On remand, the trial court concluded that respondent could not meet that standard because abundant evidence linked him to the attack. J.A. 213-222. Moreover, in connection with an April 2004 parole application (while his postconviction appeal was pending), respondent confessed, both orally and in writing, that he *had* brutally attacked K.G. Pet. App. 71a; J.A. 221. Thus, the trial court determined that new DNA testing was not likely to establish respondent's innocence. J.A. 158-160.

d. The Alaska Court of Appeals affirmed. Pet. App. 63a-90a. The court was satisfied that further DNA testing would not establish respondent's innocence. *Id.* at 79a-82a. In a concurring opinion, Judge Mannheimer, joined by Chief Judge Coats, concluded that the Alaska Constitution might require a court to review claims by defendants who presented "clear genetic evidence of their innocence," *id.* at 89a, but that respondent could not meet that threshold even if the new DNA results he sought were favorable to him, *id.* at 90a. The Alaska

Supreme Court denied discretionary review. See *id.* at 10a.

4. In 2003, respondent filed a federal civil rights action under 42 U.S.C. 1983, seeking to compel petitioners to provide him with access to some of the evidence used to convict him. J.A. 23-40. Respondent alleged that he wanted to submit the evidence for further DNA testing, at his expense, using the short-tandem-repeat (STR) and mitochondrial-DNA (mtDNA) testing methods, which were not available at the time of his 1994 trial. J.A. 24-25, 31-32.

a. The district court dismissed respondent's complaint, concluding that he was required to pursue his claim in a habeas corpus action under 28 U.S.C. 2254, rather than a Section 1983 action. Pet. App. 54a. The court of appeals reversed, *id.* at 51a-62a, holding that Section 1983 was a proper vehicle for respondent's right-of-access claim because his success on that claim would not necessarily imply that his conviction was invalid, *id.* at 57a-61a. The court remanded for the district court to consider whether respondent had a constitutional right of access to the evidence. *Id.* at 62a.

b. On remand, the district court concluded that "there *does* exist, *under the unique and specific facts presented*, a very limited constitutional right to the testing sought," but the court did not determine the specific source of that right. Pet. App. 49a.

c. The court of appeals affirmed. Pet. App. 1a-45a. While acknowledging that "the Supreme Court's cases involving *Brady* rights[] involved only the right to *pretrial* disclosure," the court relied on Ninth Circuit precedent that "applied *Brady* as a post-conviction right." *Id.* at 15a, 16a. The court further noted that respondent's "access-to-evidence claim" is "specifically in-

tended to support an application for post-conviction relief." *Id.* at 19a. The court "assume[d] for the sake of argument" that a freestanding claim of actual innocence is "cognizable in federal habeas proceedings," and held that respondent was constitutionally entitled to access to evidence that might help him develop such a claim. *Id.* at 21a. The court also suggested that respondent had a federal right to access evidence that he might use to pursue a state constitutional claim of actual innocence, a claim that state law "might" recognize. *Id.* at 19a-20a.

After reviewing the usual standards for *Brady* claims, the court held that "the standard of materiality applicable to [respondent's] claim for post-conviction access to evidence is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed to [respondent], he could prevail in an action for post-conviction relief." Pet. App. 28a. Without "determin[ing] the full breadth of post-conviction *Brady* rights," the court concluded that its standard does "not require a demonstration by a preponderance that disclosure of the DNA evidence will ultimately enable [respondent] to prove his innocence," but instead is satisfied by the "potential probative value" of the evidence in question. *Id.* at 27a, 28a. Applying that test, the court held that respondent was constitutionally entitled to test the evidence. *Id.* at 32a-44a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in discovering a new and broad-based constitutional right to obtain postconviction access to physical evidence for DNA testing. That right has never previously been recognized as to physical evidence, such as fingerprints, used to convict a defendant

during a criminal trial satisfying the numerous safeguards guaranteed by the Constitution. DNA testing is, to be sure, a valuable contribution to the criminal justice system. And recognizing that value, Congress and 44 state legislatures have recently enacted laws adopting differing approaches to ensuring access to physical evidence for DNA testing in certain circumstances. But both the novelty and the varying contours of those laws underscore the absence of any settled or fundamental tradition of granting postconviction access to physical evidence for DNA testing and the difficult line-drawing questions raised by the advent and evolution of DNA testing. This Court exercises the "utmost care" in deciding whether to recognize new constitutional rights, especially where the democratic process is already actively addressing the subject. *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotation marks omitted). And particularly in the circumstances here, the Court should decline to recognize the broad-based right asserted by respondent.

A. The court of appeals erroneously concluded that the prosecution's obligation to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), continues after a defendant has been convicted (and, as here, has exhausted appeals and state postconviction review). The *Brady* disclosure obligation has always been a preconviction right associated with the right to a fair trial, and its rationale does not apply when the presumption of innocence has been rebutted by a conviction and the government has acquired a strong interest in the finality of a presumptively valid conviction. It would also be impractical to apply *Brady* in the postconviction context, when there is no longer an "individual prosecutor" who could reasonably be expected "to learn of any

favorable evidence known to the others acting on the government's behalf in the case." *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995). Furthermore, *Brady* is particularly inapt here because the evidence at issue is, at best, potentially exculpatory and could have been destroyed as soon as respondent's conviction became final.

B. Nor has respondent demonstrated any other due process right of access to the evidence for postconviction DNA testing in the circumstances here. Respondent enjoyed the panoply of constitutional protections guaranteed to criminal defendants at trial and was convicted. Because the postconviction right he asserts relates to state criminal justice systems, due process would require the requested access only if its denial "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992) (internal quotation marks omitted). There is no tradition in this country of granting convicted criminals postconviction access to the prosecution's evidence locker, whether for DNA testing, fingerprint analysis, or other purposes. And constitutional rights do not spring into existence simply because science has advanced.

Recent legislative activity across the Nation underscores that there is no settled tradition, much less a fundamental one, of requiring postconviction access to evidence for DNA testing in the circumstances here. Congress and 44 state legislatures have authorized such testing but in doing so have imposed varying limits on it. In particular, they have evinced concerns about prisoners (like respondent) who forwent available DNA testing at their original trial or who do not maintain that they are actually innocent. Some States also require a prisoner seeking postconviction DNA testing to provide a

reason to believe (as opposed to a mere possibility) that the new tests would be exculpatory.

This Court has always been especially reluctant to create new due process rights and thereby place a "matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. Given the vibrant democratic process already underway and the myriad of different approaches that have been taken and could be taken in response to this issue, there is particularly good cause for exercising such restraint here. Moreover, the recognition of any such right would be especially untenable in the circumstances of this case, which involves a defendant who forwent more sophisticated DNA testing at trial, who later confessed to the underlying crime, and who is inculpated by other evidence. Even if the Constitution conferred some protections in this context, they would not extend to the circumstances here.

C. Respondent's constitutional claim should be rejected for the independent reason that neither he nor the Ninth Circuit has identified a viable underlying substantive right that would support his due process claim in the circumstances here. There is no substantive due process right of postconviction access to the State's evidence for DNA testing because access to evidence is a procedural matter. Moreover, any procedural due process right would have to relate to the adjudication of an underlying substantive right, but neither the court of appeals nor respondent has identified a cognizable underlying substantive right. The court of appeals assumed that respondent could use new DNA test results in pursuing a freestanding claim of actual innocence in federal habeas corpus, but this Court has never recognized such a freestanding right and, instead, has long held that "the existence merely of newly discovered evi-

dence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963). Nor does respondent have a cognizable liberty interest in pursuing executive clemency. See *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment). Finally, respondent has no federal procedural right to the government's assistance in establishing a claim of innocence in any state postconviction hearing.

States have wide discretion to ensure the availability and effectiveness of postconviction relief. Moreover, as noted, Congress and the legislatures of most States have passed laws authorizing postconviction DNA testing in varying circumstances. This is no doubt good policy, especially as science advances and DNA testing becomes more accurate and less costly, but the Ninth Circuit erred in concluding that the Constitution entitles respondent to postconviction access to the State's evidence for DNA testing in the circumstances here.

ARGUMENT

THE NINTH CIRCUIT ERRED IN HOLDING THAT THE CONSTITUTION ENTITLES RESPONDENT TO OBTAIN POSTCONVICTION ACCESS TO THE STATE'S EVIDENCE

The Ninth Circuit erred in holding that respondent enjoyed a constitutional right of postconviction access to physical evidence for DNA testing in the circumstances here. The court of appeals relied on *Brady* v. *Maryland*, 373 U.S. 83 (1963), as the source of that right, but *Brady* is limited to the pre-trial—not postconviction—setting. Moreover, while DNA testing undoubtedly can be valuable, the federal and state legislatures are actively addressing a myriad of questions related to DNA testing,

and there is no settled and fundamental tradition of requiring the government to make physical evidence available to convicted defendants in the circumstances of this case. This Court has admonished that the Judiciary should exercise great caution in deciding whether to recognize new constitutional rights where the matter is the subject of an active democratic process of experimenting with and adopting new protections. See *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997). And the Ninth Circuit erred in concluding that the recognition of a new constitutional right was warranted in the circumstances here.

A. The *Brady* Right To Receive Exculpatory Evidence In The Government's Possession Does Not Apply After Conviction

The Ninth Circuit held that *Brady* confers "a post-conviction" or "post-trial right" of access to potentially exculpatory evidence. Pet. App. 16a, 23a. That was error. Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. One of the "essential elements" of such a claim is that the evidence in question "'must have been suppressed by the State, either willfully or inadvertently.'" *Banks* v. *Dretke*, 540 U.S. 668, 691 (2004) (quoting *Strickler* v. *Greene*, 527 U.S. 263, 282 (1999)). No such suppression occurred here. Before his conviction, respondent had access to the same evidence as the State, and the same opportunity to test that evidence.

Thus, *Brady* could apply here only if the government bore an open-ended continuing duty to inform defen-

dants postconviction of new evidence—or, in this case, of the potential availability of new testing of old evidence. Moreover, respondent could prevail only if such a duty extended not only through trial, direct appeal, and collateral-review proceedings, but even at a time (like now) when no habeas proceedings remain pending. As the court of appeals recognized, this Court has never recognized such a constitutional right, and all of this Court's "cases involving *Brady* rights[] involved only the right to *pre-trial* disclosure." Pet. App. 15a. Indeed, this Court has suggested that while due process requires disclosure of significant exculpatory evidence "[a]t trial," any post-trial duty of disclosure arises only under ethics rules, not the Constitution. *Imbler* v. *Pachtman*, 424 U.S. 409, 427 n.25 (1976); cf. *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995) (explaining that "the Constitution" and *Brady* "require[] less of the prosecution than the ABA Standards for Criminal Justice").

There is no basis for extending *Brady* to the post-trial setting. Before conviction, a defendant is presumed innocent and the government bears the burden of proving guilt beyond a reasonable doubt. See, *e.g.*, *Taylor* v. *Kentucky*, 436 U.S. 478, 483 (1978); *In re Winship*, 397 U.S. 358 (1970). In the postconviction context, by contrast, the presumption of innocence has been rebutted, the conviction is presumed to be valid, and the government has a strong interest in finality. *Herrera* v. *Collins*, 506 U.S. 390, 399 (1993). Those differing burdens caution strongly against lifting *Brady* from its pre-conviction context and transposing it to the realm of collateral attacks (much less to stand-alone Section 1983 actions). Cf. *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 359 (2006) (finding *Brady* inapplicable where government

and defendant knew the same facts, but defendant did not know their legal consequences).

Furthermore, the *Brady* obligation would be impractical in the postconviction setting. For purposes of *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437; see *Strickler*, 527 U.S. at 275 n.12. That duty is appropriate before conviction because, in the course of preparing a case for trial, a prosecutor must marshal and sift through evidence in the government's possession. Thus, it is reasonable to charge the prosecutor with knowledge of the evidence, even if specific exculpatory evidence in the hands of other government agents working on that prosecution is in fact unknown to him or her. But in the context of a postconviction proceeding—which may occur long after the trial—the original prosecutors and investigating officers may well have left the government, and there can be no expectation that replacements will even have been assigned to long-dormant cases, let alone that they should be aware of new evidence or know whether such evidence would have been relevant or material to the trial. It would be even more extraordinary to impose such an obligation on the government when (as here) there is not even a pending proceeding in which the evidence in question could be used.

Moreover, this Court has contrasted "material exculpatory" evidence, to which *Brady* applies, with evidence that is merely "potentially useful." *Illinois* v. *Fisher*, 540 U.S. 544, 549 (2004) (per curiam) (quoting *Arizona* v. *Youngblood*, 488 U.S. 51, 57-58 (1988)). When only the latter sort of evidence is at stake, there is no automatic duty (even pre-trial) to preserve the evidence.

Ibid.; *Youngblood*, 488 U.S. at 58. Like the evidence in *Youngblood* and *Fisher*, the evidence here is at best "potentially exculpatory," and under those decisions, it could have been destroyed consistent with the Due Process Clause and *Brady* as soon as respondent's conviction became final. See *ibid.*

B. The Court Should Decline To Recognize A New Due Process Right To Postconviction Access To Evidence For DNA Testing In The Circumstances Of This Case

Respondent also argues that, even apart from *Brady*, the Due Process Clause entitles him to postconviction access to the State's evidence. This Court has never recognized the existence of such a right. And respondent has failed to satisfy the extremely heavy burden of demonstrating that the Court should create such a right in the circumstances here.

1. There is no tradition of granting convicted defendants access to the evidence used to convict them

In the field of criminal law and procedure, this Court has been especially hesitant to use the "open-ended rubric of the Due Process Clause" to impose demands on state criminal justice systems beyond the "specific guarantees enumerated in the Bill of Rights." *Medina* v. *California*, 505 U.S. 437, 443 (1992) (quoting *Dowling* v. *United States*, 493 U.S. 342, 352 (1990)). In this context, therefore, the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), does not apply. Instead, "a narrower inquiry [is] more appropriate": whether the challenged action "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U.S. at 445 (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)).

The Constitution establishes a panoply of rigorous safeguards when it comes to charging and trying defendants for crimes. See *Herrera*, 506 U.S. at 398-399. But the demands of due process are severely reduced once society has validly convicted an individual of a crime and thus established its right to punish. *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 288-289 (1998) (O'Connor, J., concurring in part and concurring in the judgment); see also *Pennsylvania* v. *Finley*, 481 U.S. 551, 557-559 (1987) (no right to counsel on collateral review).

There is "no settled tradition" (*Medina*, 505 U.S. at 446) of granting postconviction access to the prosecution's evidence locker—whether for DNA testing or anything else. Physical evidence such as fingerprints, strands of hair, or blood has long been used to connect individuals to crime scenes and convict them of serious offenses. Yet there is no tradition in this country of allowing convicted criminals to test—or retest—the prosecution's evidence years after a guilty verdict, or to attempt to come up with new ways of establishing that evidence used at trial was unreliable, inconclusive, or exculpatory. Neither respondent, the court of appeals, nor any other court addressing the question has identified any postconviction tradition of access to evidence. And such a tradition would fundamentally conflict with the principle that "the trial of a criminal case in state court" is "a decisive and portentous event" because the proceeding before the jury is the one in which "[t]o the greatest extent possible all issues which bear on th[e] criminal charge should be determined." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

2. The state and federal governments are currently experimenting with different approaches to postconviction DNA testing

"Contemporary practice" among the States and the federal government has only "limited relevance to the due process inquiry." *Medina*, 505 U.S. at 447. Instead, the due process inquiry looks to settled and fundamental traditions. *Id.* at 446. In this case as in *Medina*, however, it is significant that "there remains no settled view" (*id.* at 447) that someone in respondent's position should be entitled to relief. To the contrary, the federal and state governments have addressed the question only recently, and have adopted varying approaches. Those recent legislative efforts underscore both the absence of a settled and fundamental tradition, and the fact that the democratic process is working to make valuable policy gains in this area as science progresses. See *Glucksberg*, 521 U.S. at 735.

Moreover, the detailed nature of the statutes demonstrates that postconviction DNA testing presents a number of developing policy issues that are especially appropriate for the democratic process and require quintessentially legislative line drawing. See *Harvey* v. *Horan*, 285 F.3d 298, 300-301 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) (discussing the "myriad of questions that would have to be answered in order to define the parameters of a constitutional right to post-conviction access to DNA evidence").

a. Scientific advances associated with DNA have recently had a significant impact on criminal justice systems at the federal and state levels. DNA can, in appropriate circumstances, powerfully match physical evidence with a specific individual. That power has made

DNA testing an important tool in investigating crimes, convicting the guilty, and clearing the innocent.

In 1994, New York became the first State to adopt a statute that specifically authorizes inmates to obtain postconviction DNA testing in certain circumstances. See N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005). Under that statute, if a defendant moves to vacate a judgment or set aside a sentence, a court may grant an application for DNA testing of evidence "secured in connection with the [underlying] trial" if the court determines "that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial * * *, there exists a reasonable probability that the verdict would have been more favorable to the defendant." *Id.* § 440.30(1-a)(a). That reasonable probability standard has been construed as requiring the court to determine—before the testing has been carried out—both the likelihood that the new test would be exculpatory and the likelihood that such exculpatory results would have caused a different outcome at trial. *McKithen* v. *Brown*, 565 F. Supp. 2d 440, 482 (E.D.N.Y. 2008).

In 1996, the National Institute of Justice (NIJ) issued a report that discussed 28 instances in which DNA technology had established the factual innocence of a person who had been convicted of a crime and sent to prison. See Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996) (NCJ No. 161258). In response, the Attorney General requested the establishment of a commission "to identify ways to maximize the value of DNA in our criminal justice system," including ways to handle postconviction DNA testing. See National Comm'n on the Future of

DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests* at iii (1999) (NCJ No. 177626).

In 2004, Congress enacted 18 U.S.C. 3600, which allows a federal court to grant a written motion for DNA testing by an individual imprisoned or sentenced to death for a federal crime when each of 10 specific criteria is satisfied. Innocence Protection Act of 2004, Pub. L. No. 108-405, Tit. IV, 118 Stat. 2278. Some of those criteria help to ensure that the proposed testing could produce evidence that is sufficiently reliable and material to cast doubt on the conviction. For instance, the evidence in question must be in the government's possession and must have been "retained under conditions sufficient to ensure that [it] has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing." 18 U.S.C. 3600(a)(4). The proposed testing must be "reasonable in scope," use "scientifically sound methods," and be "consistent with accepted forensic practices." 18 U.S.C. 3600(a)(5). It must also be able to "produce new material evidence that would * * * raise a reasonable probability that the applicant did not commit the [underlying] offense." 18 U.S.C. 3600(a)(8).

Moreover, Section 3600 seeks to ensure that the proposed new test results would be meaningfully new. If the evidence in question was previously subjected to DNA testing, the applicant must be requesting "testing using a new method or technology that is substantially more probative than the prior DNA testing." 18 U.S.C. 3600(a)(3). If the evidence was not previously subjected to testing, the applicant must not have "knowingly and voluntarily waive[d] the right to request DNA testing of that evidence in a court proceeding after" the enactment

of Section 3600 in October 2004, or have "knowingly fail[ed] to request" testing in "a prior motion for post-conviction DNA testing." *Ibid.*

As the exclusion for those who failed to request or previously waived DNA testing shows, Congress sought to guard against strategic behavior. The applicant must "assert[], under penalty of perjury, that [he] is actually innocent" of the underlying crime. 18 U.S.C. 3600(a)(1). He must also identify a theory of defense that "is not inconsistent with an affirmative defense presented at trial," that "would establish" his "actual innocence" of the crime, and that would be "support[ed]" by the results of the proposed testing. 18 U.S.C. 3600(a)(6) and (8)(A). If the applicant was convicted at a trial, "the identity of the perpetrator" must have been "at issue in the trial." 18 U.S.C. 3600(a)(7). The applicant's motion must also be made in a "timely fashion," and Congress enacted a series of detailed rules governing timeliness. 18 U.S.C. 3600(a)(10).

Section 3600 addresses a variety of other policy decisions associated with postconviction DNA testing. When an applicant is indigent, the government will pay the costs of court-ordered testing, and the court may appoint counsel. 18 U.S.C. 3600(b)(3) and (c)(3). The applicant's own DNA profile must be submitted to the Federal Bureau of Investigation's national database of DNA profiles, which is linked with DNA profiles of convicted offenders from all 50 States (and of certain arrestees in some States). See 18 U.S.C. 3600(e)(2); 73 Fed. Reg. 74,932-74,933 (2008). The Attorney General must notify appropriate law enforcement agencies if the profile matches one associated with any other offense in the database. 18 U.S.C. 3600(e)(3). If the new testing inculpates the applicant in the underlying crime, the govern-

ment may move to have him held in contempt, have him pay the costs of testing, and have the Bureau of Prisons notified (so that it may deny the applicant good-conduct credit). 18 U.S.C. 3600(f)(2). If the applicant is convicted of perjury for making false assertions in proceedings under Section 3600, the court shall add at least three years to his term of imprisonment. 18 U.S.C. 3600(f)(3).

By contrast, if the new DNA test results "exclude the applicant as the source of the DNA evidence," he may file a motion for new trial, which can be granted "if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal." 18 U.S.C 3600(g)(1) and (2).

A total of 44 States have now joined Congress in enacting statutes providing access to postconviction DNA testing in certain circumstances.[2] In some of the States that currently lack such statutes—including Alaska—legislatures have considered similar legislation in recent years, see Br. in Opp. 12, and state courts have recognized (or left open the possibility of) a state-law entitlement to postconviction DNA testing in appropriate circumstances, see Pet. App. 111a; *Lambert* v. *State*, 777 So. 2d 45, 49 (Miss. 2001); *Jenner* v. *Dooley*, 590 N.W.2d 463, 471-472 (S.D. 1999).

b. While most legislatures have now decided to permit DNA testing in some circumstances, they dis-

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[2] The brief in opposition to certiorari (at 8 n.4) identified statutes from 43 States and the District of Columbia. In October 2008, South Carolina adopted such a statute. See Access to Justice Post-Conviction DNA Testing Act, 2008 S.C. Acts No. 413, § 1 (to be codified at S.C. Code Ann. §§ 17-28-10 *et seq.* (Supp. 2008)) (effective January 1, 2009).

agree on the circumstances in which such testing is appropriate. Many of the limitations in the state statutes are similar to those in Section 3600, presumably because they were enacted after the federal statute, which included a grant program for States that provided postconviction DNA testing "in a manner comparable to" Section 3600. See Innocence Protection Act of 2004, § 413(2)(A), 118 Stat. 2285. Thus, many state statutes require a sworn statement that the applicant did not commit the underlying crime. See, *e.g.*, Cal. Penal Code § 1405 (c)(1) (West Supp. 2009); Fla. Stat. Ann. § 925.11(2)(a) (West Supp. 2009); N.H. Rev. Stat. Ann. § 651-D:2(I) (LexisNexis 2007); S.C. Code Ann. § 17-28-40(B) and (C) (Supp. 2008). Many require identity to have been at issue in the criminal trial (even to the point of excluding applicants who pleaded guilty). Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1680 n.238 (2008) (*Claiming Innocence*). "[A]ll state statutes share the requirement that the application be made to the trial court that presided over the conviction." *Id.* at 1682.

Many of the state statutes are more restrictive than the federal statute. Some permit only defendants who have been sentenced to death to request DNA testing. See Ky. Rev. Stat. Ann. § 422.285 (LexisNexis Supp. 2008); Nev. Rev. Stat. Ann. § 176.0918 (LexisNexis 2006). Several require the requested testing to "have been technologically impossible at the trial." *Claiming Innocence* 1681 & n.242 (identifying 12 States). Some preclude testing if the applicant's attorney failed to request it at trial. *Id.* at 1682 & n.245 (identifying three States). Some, like New York, see p. 18, *supra*, require the applicant to establish some likelihood (rather than just a possibility) that the new testing will actually be

exculpatory, as opposed to inculpatory. For example, if there was prior DNA testing in the case, New Hampshire requires "clear and convincing evidence" that "the requested DNA test would provide results that are significantly more discriminating and probative on a material issue of identity, and would have a reasonable probability of contradicting prior results." N.H. Rev. Stat. Ann. § 651-D:2(III)(g) (LexisNexis 2007); see also La. Code Crim. Proc. Ann. art. 926.1.C(1) (Supp. 2009) (requiring "an articulable doubt" about applicant's guilt and a "reasonable likelihood that the requested DNA testing will * * * establish * * * innocence").

In this case, the Alaska Court of Appeals drew on other state-court precedents in holding that, assuming *arguendo* that state due process requires DNA testing in some circumstances, this case does not present such a circumstance because respondent could not demonstrate "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." Pet. App. 111a.

Other factors would bar respondent from obtaining relief in other States. He is not under a sentence of death. Respondent forwent more sophisticated DNA testing at trial. Far from maintaining his innocence, respondent later confessed to the crime. Nor has he shown any likelihood (as opposed to mere possibility) that new testing would exonerate him. To the contrary, security videotapes and telephone records show that respondent called Jackson the evening of the kidnapping and rape; witnesses then saw him get into Jackson's car; witnesses later saw him with blood on his clothes and in Jackson's company; the ax handle left at the scene of the

beating matched ones respondent had at work and home; the forensic evidence limited the range of suspects; pubic hairs on the condom and on K.G.'s sweater were similar to respondent's; Jackson identified respondent in his own post-arrest confession; and respondent himself admitted his guilt to the parole board. See pp. 2-3, 5, *supra*.

Accordingly, the recent legislative activity in this area only confirms that there is no settled tradition, much less a fundamental one, of requiring DNA testing in the circumstances of this case.

3. There is, in particular, no basis for recognizing any new constitutional right in the circumstances here

As this Court has admonished, "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. The active and ongoing legislative efforts at the federal and state level in this area call for great restraint in entertaining respondent's claim to a constitutional right to postconviction access to the State's evidence for DNA testing. See *Harvey*, 285 F.3d at 301 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) ("Only the most aggressive view of federal judicial power could lead us to preempt both a coordinate branch of the federal government and the state courts and legislatures with what would in essence be prescriptive law making of our own.").

Moreover, at least three circumstances make respondent's constitutional claim especially untenable. First, postconviction DNA testing should not be required in the absence of "a good reason for the defense's failure to

request DNA testing at the original trial (e.g., unavailability of new technology)." *ABA Standards for Criminal Justice: DNA Evidence* 117 (3d ed. 2007). Respondent has no such reason. In a strategic decision that the state courts determined to be reasonable on postconviction review, respondent's trial counsel deliberately chose to forgo RFLP testing—which could have been orders of magnitude more discriminating than the DQA testing that had already been done—precisely because it threatened to produce more powerfully inculpatory evidence.[3] The record certainly validates counsel's decision. The subsequent development of STR testing, which is now even better than RFLP, does not change the analysis, because it does not alter the fact that respondent chose not to seek far better testing that *was* available at the time of trial. Cf. Utah Code Ann. § 78B-9-301(4) (2008) (barring postconviction testing if defendant "did not request DNA testing" at the time of trial "for tactical reasons"); Wyo. Stat. Ann. § 7-12-303(d) (Supp. 2008) (similar prohibition for convictions since 2000).

Second, respondent's other conduct does not evoke the individual who "steadfastly maintains his factual innocence," *Harvey*, 285 F.3d at 319 (Luttig, J., opinion respecting denial of rehearing en banc), or, as required by many of the postconviction DNA statutes, one who has sworn under penalty of perjury that he is actually

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[3] At the petition stage, petitioners disavowed (Reply Br. 10) reliance on the pretrial decision to forgo RFLP testing. That may reflect their focus on the scope of *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and the potential existence of a freestanding innocence claim. But a decision to forgo testing at trial is plainly relevant if the Court must evaluate the interest that the government has in denying postconviction testing to those who have engaged in strategic behavior that does not appear to be consistent with actual innocence.

innocent. Respondent did submit an affidavit in the state-court proceedings, see J.A. 225-226, but as petitioners point out (Br. 42, 53-54), it was oddly worded and not a ringing affirmation of his innocence.[4] Moreover, consistent with the overwhelming weight of the evidence, respondent confessed to the parole board. Pet. App. 71a; J.A. 221. And he later admitted that he would lie to obtain his release. J.A. 227.

Third, it appears quite likely that further DNA testing would only provide further evidence of respondent's guilt. While the federal DNA statute does not look to whether the results of requested testing would likely be favorable or unfavorable to the applicant, some of the state statutes do. See pp. 18, 19, 22-23, *supra*. And as discussed above, the evidence against respondent is extremely strong. For those reasons, even if the Constitution afforded some protections in this context, notwithstanding the absence of any settled or fundamental practice to that effect, the Ninth Circuit erred in recognizing a new, broad-based right of postconviction access to evidence for DNA testing in the circumstances of this case.[5]

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[4] Instead of directly asserting his innocence, respondent declared that he has "always maintained [his] innocence" (and then went on to disprove that statement by acknowledging that he confessed to the parole board). J.A. 226, 227. He also asserted: "I have no doubt whatsoever that re-testing of the condom will prove once and for all time either *my guilt* or innocence." J.A. 227 (emphasis added). An actually innocent man would presumably be confident that a test will not "prove" his "guilt."

[5] As discussed, this case is governed by *Medina*, not *Mathews*. Nevertheless, the same result would obtain in this case even if—notwithstanding the inextricable ties between the asserted right and the criminal justice system—the Court were to apply the *Mathews* balancing test. Here, where respondent chose not to seek more sophisti-

C. Neither Respondent Nor The Ninth Circuit Has Identified A Liberty Interest That Could Give Rise To A Postconviction Due Process Right To DNA Testing

The Court may reverse the judgment below based on the absence of any settled or fundamental practice of permitting convicted persons access to DNA testing in the circumstances of this case and the other considerations discussed above. As a result, the Court need not reach the independent question whether respondent has a protected liberty interest that could give rise to the due process right he asserts to postconviction DNA testing. In any event, neither respondent nor the court of appeals has identified such an interest in the circumstances here.

1. Substantive due process protects "fundamental rights" that are so "deeply rooted in our legal tradition" that the government generally may not infringe them regardless of the procedures used. *Glucksberg*, 521 U.S. at 719, 722. A right of access to evidence is not such a right. It relates not to substantive rights such as those "to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, [and] to

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cated DNA testing at the time of trial, where he later confessed to the crime, and where there is little reason (other than his continually changing story) to believe that new testing would result in evidence favorable to him, the risk of an erroneous deprivation and the value of additional procedural safeguards (*Mathews*, 424 U.S. at 335) are reduced and outweighed by the government's interests in avoiding indefinite re-litigation by prisoners who have already exhausted their appeals and other postconviction relief. Moreover, any balancing would still need to be predicated on the deprivation of a constitutionally protected liberty interest. See *Harvey* v. *Horan*, 278 F.3d 370, 388 (4th Cir. 2002) (King, J., concurring). As discussed next, respondent has not established the deprivation of any such interest.

use contraception," *id.* at 720 (citations omitted), but instead to the procedures by which guilt or innocence is determined. Indeed, the Due Process Clause protects life, liberty, and property (U.S. Const. Amend. XIV), and access to evidence is none of those things; instead, it relates to the procedures used to protect those interests. Thus, evidence is a traditional subject for the federal rules of criminal and civil *procedure*, see Fed. R. Crim. P. 15-16; Fed. R. Civ. P. 26-37, which are by definition non-substantive, see 28 U.S.C. 2072(b). Morever, there is no reason to doubt that the government may impose reasonable restrictions on access to such evidence, as Congress and nearly every state legislature have done.

2. Respondent has not identified any other substantive foundation for a procedural due process right to the postconviction access to evidence he seeks. As this Court has observed, "[p]rocess is not an end in itself." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983). Instead, "[i]ts constitutional purpose is to protect a substantive interest to which [an] individual has a legitimate claim of entitlement." *Ibid.* The court of appeals therefore erred by simply "assum[ing] for the sake of argument" that a freestanding claim of actual innocence would be "cognizable in federal habeas proceedings," Pet. App. 21a, and that state law "might" also give rise to such a claim, *id.* at 19a-20a. In the absence of an actual substantive right to protect, there can be no procedural due process right. *Olim*, 461 U.S. at 249-251. And neither the Ninth Circuit nor respondent has identified such a substantive right.

a. The Ninth Circuit erred in assuming that a standalone claim of actual innocence is cognizable in federal habeas. "[F]ederal habeas courts sit to ensure that indi-

viduals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera*, 506 U.S. at 400; accord, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 495 (1991). Thus, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400. To the contrary, "*the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.*" *Ibid.* (quoting *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963)).

Indeed, because of the importance of the trial in determining factual guilt or innocence and the overriding state interests of comity and finality, "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Herrera*, 506 U.S. at 401. To be sure, new evidence may cast doubt, even serious doubt, on criminal convictions. But for centuries, "[e]xecutive clemency," not habeas claims of actual innocence, "has provided the 'fail safe' in our criminal justice system." *Id.* at 415 (citation omitted); see *id.* at 412. See also U.S. Br. at 8, 12-24, *Herrera*, *supra* (No. 91-7328).

In *Herrera*, the Court "assume[d], for the sake of argument * * *, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417; accord *House* v. *Bell*, 547 U.S. 518, 554-555 (2006). But this is not a capital case. And the Court has never assumed, much less recognized, any *liberty* interest for a convicted person not sentenced to death.

To the contrary, once "a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 280 (plurality opinion).

Respondent has argued (Br. in Opp. 31) that, rather than pursue a freestanding federal habeas claim, he might use new DNA evidence in "asserting a 'gateway' claim of actual innocence, to permit the consideration of otherwise-barred constitutional claims (such as ineffective assistance of trial counsel)." That argument is at best premature because respondent has not filed a federal habeas petition. And, in any event, respondent has not shown that he can assert any federal habeas claims that would be meritorious but for a procedural bar that would be overcome by proof of innocence. For instance, on postconviction review, the state courts rejected respondent's ineffective-assistance-of-counsel claim not because of a procedural bar, but because counsel made a reasonable strategic decision. See p. 4-5, *supra*. Moreover, to the extent that respondent wants discovery for a federal habeas claim, he may seek discovery, consistent with the rules that govern discovery in habeas, after filing a federal habeas petition and demonstrating that he has a claim that warrants discovery under those rules. See Fed. R. Governing Section 2254 Cases 6(a); cf. Fed. R. Governing Section 2255 Proceedings 6(a). But he has no general constitutional right of access to evidence for purposes of attempting to establish actual innocence in federal habeas.

b. Respondent has said he might ultimately attempt to bring a "clemency proceeding where he can make a showing of actual innocence." J.A. 38. He is free to do

so in accordance with Alaska law. There is, however, no general federal constitutional right to clemency. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 463-464 (1981). And because clemency is a matter of grace, the Court has never placed procedural limitations on clemency proceedings. See *Woodard*, 523 U.S. at 285 (plurality opinion). Instead, in *Woodard*, the plurality, *id.* at 280, and the concurrence agreed that once "a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished." *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment). While Justice O'Connor suggested that a *life* interest might justify some "*minimal* procedural safeguards" against deprivations such as flipping a coin to decide whether to grant clemency, *ibid.*, this case involves neither a life interest nor a wholly arbitrary deprivation, in light of the careful consideration that the State has given to his claim.

c. Nor do this Court's cases confer on respondent any procedural right to government assistance in establishing a claim of innocence in his state postconviction hearing. As in the clemency context, this Court has exercised great caution to avoid federalizing procedural protections in that realm. See *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1046-1047 (2008) (expressing "uncertainty about the source of authority to impose a federal limit on the power of state judges to remedy wrongful state convictions"). Indeed, this Court has never held that defendants have a constitutional right to direct review, much less collateral review, of a state court conviction. See *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005); see also *Case* v. *Nebraska*, 381 U.S. 336, 337 (1965). And when States make collateral postconviction proceedings available, they retain "substantial discretion to develop

and implement programs to aid prisoners seeking to secure postconviction review." *Finley*, 481 U.S. at 559; accord *Murray* v. *Giarratano*, 492 U.S. 1, 14-15 (1989) (Kennedy, J., concurring in the judgment). Indeed, convicted persons do not even have a right to counsel in whatever postconviction proceedings a State chooses to provide. *Id.* at 11-12 (plurality opinion); *Finley*, 481 U.S. at 557-559.

In addition, because the States are not required to provide collateral postconviction remedies, the applicability of any federal due process right would depend on a State's decision to create such a remedy. As the court of appeals recognized, however, it is unclear whether a freestanding claim of actual innocence is viable under Alaska law. Pet. App. 19a-20a. The court of appeals erred in invoking potential state-law remedies as a basis for requiring access to evidence without first deciding whether those remedies actually exist.

Alaska permits a defendant to seek postconviction relief, without regard to otherwise applicable procedural bars, if the defendant has proceeded with due diligence and newly discovered evidence establishes his innocence clearly and convincingly. Alaska Stat. §§ 12.72.010(4), 12.72.020(b) (2006). But that statute requires the applicant to present the newly discovered evidence as a predicate for bringing the claim in the first place. *Id.* § 12.72.020(b)(2). It does not provide a right to discovery to applicants, such as respondent, lacking such evidence. State law therefore provides no apparent basis for recognizing the novel constitutional right asserted by respondent.

In any event, this Court need not reach the question whether (or in what circumstances) there is any liberty interest supporting the creation of a procedural due pro-

cess right because, as discussed above, there is no fundamental tradition of requiring postconviction access to the State's physical evidence for DNA testing, and, at a minimum, no basis for recognizing any constitutional right to such evidence in the circumstances here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

18 U.S.C. 3600 provides:

DNA testing

(a) IN GENERAL.—Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the "applicant"), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply:

(1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent of—

(A) the Federal offense for which the applicant is under a sentence of imprisonment or death; or

(B) another Federal or State offense, if—

(i) evidence of such offense was admitted during a Federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or new sentencing hearing; and

(ii) in the case of a State offense—

(I) the applicant demonstrates that there is no adequate remedy under State law to permit DNA testing of the specified evidence relating to the State offense; and

(II) to the extent available, the applicant has exhausted all remedies available under State law for requesting DNA testing of specified evidence relating to the State offense.

(2) The specific evidence to be tested was secured in relation to the investigation or prosecution of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

(3) The specific evidence to be tested—

(A) was not previously subjected to DNA testing and the applicant did not—

(i) knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of the Innocence Protection Act of 2004; or

(ii) knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing; or

(B) was previously subjected to DNA testing and the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing.

(4) The specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.

(5) The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices.

(6) The applicant identifies a theory of defense that—

(A) is not inconsistent with an affirmative defense presented at trial; and

(B) would establish the actual innocence of the applicant of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

(7) If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial.

(8) The proposed DNA testing of the specific evidence may produce new material evidence that would—

(A) support the theory of defense referenced in paragraph (6); and

(B) raise a reasonable probability that the applicant did not commit the offense.

(9) The applicant certifies that the applicant will provide a DNA sample for purposes of comparison.

(10) The motion is made in a timely fashion, subject to the following conditions:

(A) There shall be a rebuttable presumption of timeliness if the motion is made within 60 months of enactment of the Justice For All Act of 2004 or within 36 months of conviction, whichever comes later. Such presumption may be rebutted upon a showing—

(i) that the applicant's motion for a DNA test is based solely upon information used in a previously denied motion; or

(ii) of clear and convincing evidence that the applicant's filing is done solely to cause delay or harass.

(B) There shall be a rebuttable presumption against timeliness for any motion not satisfying subparagraph (A) above. Such presumption may be rebutted upon the court's finding—

(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant's motion for a DNA test;

(ii) the evidence to be tested is newly discovered DNA evidence;

(iii) that the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or

(iv) upon good cause shown.

(C) For purposes of this paragraph—

(i) the term "incompetence" has the meaning as defined in section 4241 of title 18, United States Code;

(ii) the term "manifest" means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident.

(b) NOTICE TO THE GOVERNMENT; PRESERVATION ORDER; APPOINTMENT OF COUNSEL.—

(1) NOTICE.—Upon the receipt of a motion filed under subsection (a), the court shall—

(A) notify the Government; and

(B) allow the Government a reasonable time period to respond to the motion.

(2) PRESERVATION ORDER.—To the extent necessary to carry out proceedings under this section, the court shall direct the Government to preserve the specific evidence relating to a motion under subsection (a).

(3) APPOINTMENT OF COUNSEL.—The court may appoint counsel for an indigent applicant under this section in the same manner as in a proceeding under section 3006A(a)(2)(B).

(c) TESTING PROCEDURES.—

(1) IN GENERAL.—The court shall direct that any DNA testing ordered under this section be carried out by the Federal Bureau of Investigation.

(2) EXCEPTION.—Notwithstanding paragraph (1), the court may order DNA testing by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results.

(3) COSTS.—The costs of any DNA testing ordered under this section shall be paid—

(A) by the applicant; or

(B) in the case of an applicant who is indigent, by the Government.

(d) TIME LIMITATION IN CAPITAL CASES.—In any case in which the applicant is sentenced to death—

(1) any DNA testing ordered under this section shall be completed not later than 60 days after the date on which the Government responds to the motion filed under subsection (a); and

(2) not later than 120 days after the date on which the DNA testing ordered under this section is completed, the court shall order any post-testing procedures under subsection (f) or (g), as appropriate.

(e) REPORTING OF TEST RESULTS.—

(1) IN GENERAL.—The results of any DNA testing ordered under this section shall be simultaneously disclosed to the court, the applicant, and the Government.

(2) NDIS.—The Government shall submit any test results relating to the DNA of the applicant to the National DNA Index System (referred to in this subsection as "NDIS").

(3) RETENTION OF DNA SAMPLE.—

(A) ENTRY INTO NDIS.—If the DNA test results obtained under this section are inconclusive or show that the applicant was the source of the DNA evidence, the DNA sample of the applicant may be retained in NDIS.

(B) MATCH WITH OTHER OFFENSE.—If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the DNA sample of the applicant results in a match between the DNA sample of the applicant and another offense, the Attorney General shall notify the appropriate agency and preserve the DNA sample of the applicant.

(C) NO MATCH.—If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the DNA sample of the applicant does not result in a match between the DNA sample of the applicant and another offense, the Attorney General shall destroy the DNA sample of the applicant and ensure that such information is not retained in NDIS if there is no other legal authority to retain the DNA sample of the applicant in NDIS.

(f) POST-TESTING PROCEDURES; INCONCLUSIVE AND INCULPATORY RESULTS.—

(1) INCONCLUSIVE RESULTS.—If DNA test results obtained under this section are inconclusive, the court may order further testing, if appropriate, or may deny the applicant relief.

(2) INCULPATORY RESULTS.—If DNA test results obtained under this section show that the applicant was the source of the DNA evidence, the court shall—

(A) deny the applicant relief; and

(B) on motion of the Government—

(i) make a determination whether the applicant's assertion of actual innocence was false, and, if the court makes such a finding, the court may hold the applicant in contempt;

(ii) assess against the applicant the cost of any DNA testing carried out under this section;

(iii) forward the finding to the Director of the Bureau of Prisons, who, upon receipt of such a finding, may deny, wholly or in part, the good conduct credit authorized under section 3632 on the basis of that finding;

(iv) if the applicant is subject to the jurisdiction of the United States Parole Commission, forward the finding to the Commission so that the Commission may deny parole on the basis of that finding; and

(v) if the DNA test results relate to a State offense, forward the finding to any appropriate State official.

(3) SENTENCE.—In any prosecution of an applicant under chapter 79 for false assertions or other conduct in proceedings under this section, the court, upon conviction of the applicant, shall sentence the applicant to a term of imprisonment of not less than 3 years, which shall run consecutively to any other term of imprisonment the applicant is serving.

(g) POST-TESTING PROCEDURES; MOTION FOR NEW TRIAL OR RESENTENCING.—

(1) IN GENERAL.—Notwithstanding any law that would bar a motion under this paragraph as untime-

ly, if DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, the applicant may file a motion for a new trial or resentencing, as appropriate. The court shall establish a reasonable schedule for the applicant to file such a motion and for the Government to respond to the motion.

(2) STANDARD FOR GRANTING MOTION FOR NEW TRIAL OR RESENTENCING.—The court shall grant the motion of the applicant for a new trial or resentencing, as appropriate, if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal of—

(A) in the case of a motion for a new trial, the Federal offense for which the applicant is under a sentence of imprisonment or death; and

(B) in the case of a motion for resentencing, another Federal or State offense, if evidence of such offense was admitted during a Federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or a new sentencing proceeding.

(h) OTHER LAWS UNAFFECTED.—

(1) POST-CONVICTION RELIEF.—Nothing in this section shall affect the circumstances under which a person may obtain DNA testing or post-conviction relief under any other law.

(2) HABEAS CORPUS.—Nothing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.

(3) NOT A MOTION UNDER SECTION 2255.—A motion under this section shall not be considered to be a motion under section 2255 for purposes of determining whether the motion or any other motion is a second or successive motion under section 2255.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
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No. 08-6

IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, RUTHERFORD INSTITUTE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, RUTHERFORD INSTITUTE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The American Civil Liberties Union, Rutherford Institute, and National Association of Criminal Defense Lawyers respectfully submit this brief as *amici curiae* in support of the respondent.[1]

INTEREST OF *AMICI CURIAE*

Amici have a substantial interest in the resolution of the questions presented in this case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has appeared before this Court in numerous cases involving the scope of the Constitution's protection for persons convicted of criminal offenses.

The Rutherford Institute is an international civil liberties and human rights organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have filed with the Clerk of the Court blanket letters of consent to briefs of *amicus curiae*.

charge to individuals whose civil liberties are threatened or violated. The Institute also strives to educate the public about constitutional and human rights issues. During its 26-year history, attorneys affiliated with the Institute have represented numerous parties in state and federal courts, as well as before the U.S. Supreme Court. The Rutherford Institute has also filed *amicus curiae* briefs in cases concerning the criminal justice system and its effects on the rights of those accused with criminal offenses.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of more than 11,000 attorneys, with an additional 28,000 affiliate members in every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL frequently files briefs before this Court in cases concerning the constitutional safeguards in the criminal justice system.

SUMMARY OF ARGUMENT

If the Constitution's protection of individual liberty means anything, it must mean that a state cannot continue to detain someone who conclusively proves through a DNA test that he is innocent of the

crime that is the basis for his incarceration. A jury's determination of guilt rests on the evidence that was before it. That jury determination cannot, and does not, extinguish a person's fundamental liberty interest in securing his release based on new evidence that conclusively proves his innocence.

This Court has twice assumed that a person who can make an extraordinarily high showing of his actual innocence states a constitutional claim. When a person can conclusively prove his innocence, that high threshold is satisfied. And whether or not other forms of evidence could satisfy that standard, modern DNA evidence unquestionably can.

When a person conclusively establishes his innocence through a DNA test, there is no possible legitimate state interest in continuing to detain him. Because of the unique reliability of DNA testing, there can be no concern that this second determination may be less reliable than the first. And a state has no finality interest in a conviction that has been conclusively shown to be inaccurate. The continued imprisonment of a person who has conclusively proven his innocence through DNA testing therefore violates Due Process under any potentially applicable standard. It constitutes an arbitrary abridgement of liberty; it shocks the conscience; and it violates the fundamental principle of justice that the innocent should be free.

Due Process also guarantees access to the DNA evidence necessary to establish an actual innocence claim. The same fairness and truth-seeking principles that require pre-trial disclosure of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83

(1963), also require the government to honor a specific post-trial request for DNA evidence that has the potential to establish actual innocence. DNA evidence is uniquely capable of proving an actual innocence claim; there is no source for the evidence other than the government; and the government has no legitimate interest in denying access to evidence that may conclusively prove that a person has been imprisoned for an offense he did not commit.

ARGUMENT

I. THE DUE PROCESS CLAUSE PROHIBITS THE CONTINUED DETENTION OF A PERSON WHO CONCLUSIVELY ESTABLISHES HIS INNOCENCE THROUGH A DNA TEST

Petitioners argue that a person convicted of a crime after a fair trial cannot assert a freestanding claim of actual innocence under the Constitution. *See* Petr. Br. 15. Based on that premise, petitioners argue that there can be no right of access to obtain evidence to prove an actual innocence claim. *Id.* Petitioners' assertion that an actual innocence claim is never cognizable under the Constitution is mistaken. When a person can conclusively establish his innocence through DNA testing, the Constitution prohibits his continued detention. If the Constitution's protection of liberty means anything, it must mean that a state presented with conclusive DNA evidence of a person's innocence may not continue to detain that person for a crime he did not commit.

A. A Person Convicted Of An Offense Has A Powerful Liberty Interest In Securing His Release Based On New Evidence That Conclusively Establishes His Innocence

1. The Due Process Clause prohibits a state from convicting and punishing a person without adequate evidence of guilt. *Thompson v. Louisville*, 362 U.S. 199, 206 (1960). In *Jackson v. Virginia*, 443 U.S. 307, 316, 321 (1979), the Court clarified that the evidence must be sufficient to support a finding of guilt beyond a reasonable doubt. To ensure that this standard is satisfied, a "federal court has a duty to assess the historic facts" of a case and determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318, 319 (emphasis deleted).

Thompson and *Jackson* establish that the Due Process Clause is concerned not only with the procedures used to determine a person's guilt, but also with whether the evidence actually supports a finding of guilt. When the evidence is insufficient to establish a person's guilt, the Due Process Clause prohibits a state from depriving that person of his liberty.

2. The Constitution's protection for persons who are innocent of wrongdoing does not vanish simply because a person has received a fair trial and the evidence at trial is sufficient to support a finding of guilt. After conviction, evidence may come to light that conclusively exonerates that person. Such a

person retains an undeniably powerful liberty interest in securing his freedom based on that new evidence.

After a trial and conviction, a person is no longer entitled to the freedom that preceded his conviction. And there is much the state can do in confining him that requires no further justification. *Meachum v. Fano*, 427 U.S. 215, 225 (1976). Even after conviction, however, a person retains those liberty interests that are not by their nature extinguished by the jury's determination. *See Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (convicted person has liberty interest in avoiding confinement in a mental institution); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (convicted person has liberty interest in avoiding administration of psychotropic drugs); *cf. Panetti v. Quarterman*, 127 S. Ct. 2842, 2847-48 (2007) (determination of competency to stand trial does not foreclose a prisoner from establishing he is incompetent to be executed because of his present mental condition).

The individual's interest in securing freedom based on new evidence that conclusively establishes innocence ranks at the top of such residual liberty interests. A jury's determination of guilt is based on the evidence that is submitted to it. That adjudication does not remotely suggest that it would be consistent with Due Process to continue to detain a person after he has conclusively demonstrated through new evidence that he is actually innocent of the crime.

Indeed, a jury determination of guilt has never categorically barred a person from seeking to secure

his liberty based on evidence that was not available at the time of trial. Throughout history, the practice of the federal government and of the states has been to leave some avenue open for a defendant to file a motion for a new trial based on new evidence that undermines the jury's determination. *See Herrera v. Collins*, 506 U.S. 390, 407-11 (1993). That practice reflects the longstanding understanding that, at least in some circumstances, a jury determination of guilt cannot justify a continuing deprivation of liberty when new evidence establishes that an innocent person has been detained for a crime he did not commit.

Thus, even when a jury determination of guilt is supported by the evidence at trial, the individual "retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (plurality opinion); *see Harvey v. Horan*, 285 F.3d 298, 313 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[O]ne retains, even after conviction and sentence . . . a protected liberty interest to pursue his freedom from confinement.").

B. The Court Has Assumed That A Person Can State A Constitutional Claim Based On Actual Innocence

This Court has twice assumed that a person who can establish his actual innocence states a constitutional claim. In *Herrera*, the Court "assumed" that a showing of actual innocence "would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue

open to process such a claim." 506 U.S. at 417. Similarly, in *House v. Bell*, 547 U.S. 518, 554 (2006), the Court again assumed the viability of a free-standing, actual innocence claim.

In those two cases, the Court also addressed the standard that would apply to an actual innocence claim. In *Herrera*, the Court announced that a person would have to make a "truly persuasive" and "extraordinarily high" threshold showing of his actual innocence. 506 U.S. at 417. In *House*, the Court stated that a freestanding actual innocence claim would require "more convincing proof of innocence" than the "gateway" standard of *Schlup v. Delo*, 513 U.S. 298, 327 (1995), which permits the filing of a successive habeas petition that would otherwise be procedurally barred upon a showing that, "in light of new evidence, it is more likely than not that no reasonable juror would have found [the individual] guilty beyond a reasonable doubt." *House*, 547 U.S. at 536-37 (citing *Schlup*, 513 U.S. at 327).

The Court rested the need for this high threshold on its concern that actual innocence claims, if not carefully cabined, could adversely affect the state's interests in the accuracy and finality of its convictions. The Court noted that a second trial might be more unreliable than the first in many cases because memories fade and witnesses may become unavailable. *Herrera*, 506 U.S. at 403. And it noted the tension between a low threshold for actual innocence claims and the finality interests expressed in the traditional rule limiting the time period for filing new trial motions. *Id.* at 408-11.

The high threshold contemplated by *Herrera* and *House* could be framed in a number of different ways. For example, Justice White formulated the standard as one requiring proof that "based on proffered newly discovered evidence and the entire record before the jury[,] . . . no rational trier of fact could find proof of guilt beyond a reasonable doubt." *Herrera*, 506 U.S. at 429 (White, J., concurring in the judgment) (internal quotation marks omitted). The Ninth Circuit requires a petitioner to "affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (citing *Herrera*, 506 U.S. at 442-44 (Blackmun, J., dissenting)). And, in the Eighth Circuit, a person must introduce "clear and convincing evidence" that "unquestionably establish[es] the petitioner's innocence." *Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997).

Just like *Herrera* and *House*, this case does not require the Court to resolve precisely what standard must be met in order to raise an "actual innocence" claim. Under any plausible formulation, the standard would be satisfied by proof that new evidence conclusively exonerates a person convicted of an offense. And regardless of whether other evidence could satisfy that standard, DNA testing unquestionably can. Indeed, petitioners have conceded that a favorable DNA test in this case would conclusively establish respondent's innocence. Cert. Reply Br. 8.

C. When New DNA Conclusively Establishes A Person's Innocence, His Continued Detention Violates Due Process

Similarly, there is no need in this case for the Court to decide whether evidence other than DNA evidence could satisfy the standard contemplated by *Herrera* and *House* for actual innocence claims. The Court should hold, however, that where new DNA testing conclusively establishes a person's innocence the person's continued detention violates Due Process. A person who makes that showing has an overpowering liberty interest in securing his release, and there is no possible government justification for detaining him. Under any potentially applicable standard, his continued detention would constitute a core violation of Due Process.

1. Short Tandem Repeat (STR) DNA technology can "distinguish between any two individuals on the planet," except identical twins. *Harvey*, 285 F.3d at 304-05 (Luttig, J.). For that reason, new DNA technology can "render[] it literally possible to confirm guilt or innocence beyond any question whatsoever." *Id.* at 305.

In that respect, modern DNA testing is fundamentally different from other forms of evidence. While other evidence, such as the testimony of witnesses, can lose reliability over time, "DNA evidence is uniquely probative and timeless if preserved and tested properly." Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1647 (2008) ("*Claiming Innocence*") (internal quotation marks omitted).

These are "no ordinary developments, even for science." *Harvey*, 285 F.3d at 305 (Luttig, J.). "And neither can they be treated as ordinary developments for law." *Id.* Because an authoritative DNA test can conclusively demonstrate innocence, the concern that retrying a case years after the crime will be less accurate than the first trial is simply not implicated. Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 595-96 (2002). That concern, therefore, cannot possibly justify detaining someone who has been conclusively exonerated by a DNA test.

2. Nor does a concern for "finality" for its own sake. Although the state has a strong interest in a final, *reliable* conviction, it has no interest in preserving a conviction that has been conclusively shown to be inaccurate through an authoritative DNA test. The state's interest, after all, "is not that it shall win a case, but that justice shall be done." *See Berger v. United States*, 295 U.S. 78, 87 (1935).

The states themselves have recognized that their general interest in finality does not justify detaining a person who is conclusively exonerated by a DNA test. An overwhelming number of states have enacted statutes that except from their traditional statutes of limitations motions based on new DNA evidence. *Claiming Innocence*, 92 Minn. L. Rev. at 1675. Other states "excuse late post-conviction filings based on evidence of innocence" or permit filings based on newly discovered evidence of innocence "at any time." *Id.* at 1674. According to one source, at most three states apply their traditional statutes of limitations to motions based on new DNA evidence.

Id. at 1675. And respondent's research indicates that there is only one state that fails to provide any mechanism by which an individual may seek relief based on new evidence, even if the traditional statute of limitations has run. *See* Resp. Br. 29 & n.11. Congress similarly has enacted legislation that exempts innocence claims based on DNA evidence from the limitations period for new trial motions. *See* 18 U.S.C. § 3600(g). This virtual consensus at the state and federal level confirms that finality interests cannot possibly justify detaining someone who can conclusively establish his innocence through a DNA test.

3. Because the states lack any interest in detaining a person who can conclusively establish his innocence through DNA testing, the continued detention of such a person violates Due Process under any potentially applicable standard. It amounts to an "arbitrary" abridgement of the "[f]reedom from bodily restraint" that "has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 78-79 (1992). It "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (setting forth standard); *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998) (applying *Rochin* standard). And it offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Medina v. California*, 505 U.S. 437, 445 (1992): that "the innocent go free," *Herring v. New York*, 422 U.S. 853, 862 (1975). If anything, that understates the matter. When a person convicted of a crime has proven to a scientific certainty that he did not commit it, no reasonable system of justice

would countenance any possibility other than his immediate release.

4. The Solicitor General contends that the Court has assumed only that an actual innocence claim is cognizable in capital cases, and that there is no basis for recognizing such a claim in a non-capital case. But while capital defendants raised actual innocence claims in *Herrera* and *House,* there is no basis for drawing a distinction between the two on this core liberty issue.

The text of the Due Process Clause protects against deprivations of both "life" and "liberty" without Due Process. "Just as the capital prisoner continues to possess an interest in his life because he is still alive, so also does the noncapital prisoner continue to have a liberty interest in his freedom, at least for those days that remain to be served on his sentence." *Harvey*, 285 F.3d at 314 (Luttig, J.). And just as a showing of actual innocence based on a conclusive DNA test makes it "arbitrary," "shock[ing]" to "the conscience," and inconsistent with a "fundamental" "principle of justice" to execute a person, continuing to incarcerate a conclusively innocent person deeply offends those Due Process standards.

II. THE DUE PROCESS CLAUSE ESTABLISHES A RIGHT OF ACCESS TO DNA EVIDENCE TO PROVE AN ACTUAL INNOCENCE CLAIM

Because a person who can conclusively establish his innocence based on DNA evidence has a right to bring an actual innocence claim, he also has a corresponding Due Process right of access to DNA evidence in the government's exclusive possession that

would allow him to establish that claim. That right of access is firmly grounded in the Due Process principles underlying the Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963).[2]

A. The Due Process Principles Underlying *Brady* Guarantee A Right Of Access To DNA Evidence

In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court subsequently held that the government has a duty to disclose material exculpatory evidence even when there is no defense request. *United States v. Agurs*, 427 U.S. 97, 103-04 (1976).

The right of access at issue here is premised on a specific request for identified DNA evidence that could prove actual innocence. There is no claim in this case that a prosecutor who has obtained a conviction has an ongoing post-conviction duty to keep apprised of any and all new evidence that might support an actual innocence claim, or to turn such evidence over without a request. *See* U.S. Br. 14. However, the principles underlying *Brady* compel the government to honor the limited right of access respondent seeks here. When a person asserting his

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[2] As respondent explains, there is also a right of access in order to pursue state law clemency and state law new trial motions. *See* Resp. Br. 29-31. This brief addresses only the right of access to pursue an actual innocence claim based on the federal constitution.

innocence makes a request for specific DNA evidence and that evidence could conclusively prove his actual innocence, the Due Process principles underlying *Brady* preclude the government from simply withholding it. *See Agurs*, 427 U.S. at 106.[3]

As explained in *Brady* and subsequent cases, *Brady*'s holding rests on three underlying Due Process principles. First, it is "unfair" for the government to withhold from the accused exculpatory evidence that is in the government's possession. *Brady*, 373 U.S. at 87. Second, the government's disclosure of exculpatory evidence to the accused is necessary to "protect[] the innocent from erroneous conviction." *California v. Trombetta*, 467 U.S. 479, 485 (1984). And third, disclosure of exculpatory evidence reflects that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

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[3] *Amici* believe that when a prosecutor has actual knowledge that a DNA test conclusively establishes a person's innocence, Due Process would also require the prosecutor to disclose that evidence even absent a request. *See Agurs*, 427 U.S. at 107; *see also Warney v. City of Rochester*, 536 F. Supp. 2d 285, 289-97 (W.D.N.Y. 2008) (denying prosecutors' motion to dismiss a former inmate's suit alleging that prosecutors withheld the results of an exculpatory DNA test for a significant period of time even though the "the evidence was obviously exculpatory" and "undeniably pointed toward [the inmate's] innocence"). Whatever the precise scope of that duty, it ought to apply as well to other potentially conclusive evidence of innocence—such as a videotape of someone else committing the crime. Those issues, however, are not presented by this case.

Because *Brady* addresses the government's obligations to disclose exculpatory evidence before trial, its holding does not directly apply here. But the fundamental fairness and truth-seeking imperatives that underlie *Brady* require recognition of a post-trial right of access to DNA evidence that has the potential to conclusively prove an actual innocence claim.

It is almost self-evident that withholding DNA evidence that can prove an actual innocence claim is "unfair" to the person seeking to prove that claim. *Brady*, 373 U.S. at 87. As already discussed, DNA evidence is uniquely capable of proving such a claim. Indeed, without DNA evidence, it may be nearly impossible to satisfy the high showing that is necessary to establish an actual innocence claim. Kreimer & Rudovsky, *supra*, at 590. Moreover, a person seeking to prove a claim through DNA evidence is entirely dependent on the government, because only the government will have access to that evidence. *Id.* at 565. Accordingly, when a person seeks access to DNA evidence to prove an actual innocence claim, withholding that evidence is fundamentally unfair.

A right of access to DNA evidence is also necessary to "protect[] the innocent from erroneous conviction." *Trombetta*, 467 U.S. at 485. Unlike a person who seeks access to exculpatory evidence before trial, a person who seeks DNA evidence to prove an actual innocence claim is not presumed to be innocent. But the many cases in which modern DNA evidence has established the actual innocence of persons convicted of crimes attests to the fallibility of convictions that were secured without it. *See* Innocence Project, Facts of Post-Conviction DNA Exon-

erations, *at* http://www.innocenceproject.org/Content/351.php (last visited Jan. 29, 2009) ("Innocence Project Facts") (so far, 232 people have been exonerated through post-conviction testing of DNA evidence). And the widespread practice of the state and federal governments in providing access to DNA evidence proclaims their own understanding that such access is indispensable to ensuring the protection of the innocent from an erroneous conviction.

Finally, a right of access to DNA evidence that could prove an actual innocence claim serves the government's goal of seeing that "justice shall be done." *Kyles*, 514 U.S at 430 (quoting *Berger*, 295 U.S. at 88). If the DNA evidence "exonerates the defendant, then the goal of not allowing an innocent person to stand convicted is served." *Davi v. Class*, 609 N.W.2d 107, 113 (S.D. 2000). At the same time, if the evidence incriminates the defendant, then the reliability of the conviction becomes that much more certain. *Id.* Either result furthers the government's overriding interests in "see[ing] that, so far as possible, truth emerges." *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in the judgment). Indeed, when a DNA test could conclusively prove a person's innocence, it is hard to imagine why any public servant would have any interest at all in withholding that evidence.

Thus, "[a]t least where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial

production of this infinitely narrower category of evidence." *Harvey*, 285 F.3d at 317 (Luttig, J.). "And it does so out of recognition of the same systemic interests in fairness and ultimate truth." *Id.*[4]

B. Petitioners' Proposed Conditions On Access Are Impermissible

Relying on the federal DNA statute, petitioners contend that a state may permissibly establish as conditions on DNA access that a person formally declare his innocence and that he establish the materiality of new DNA testing. Petr. Br. 53 (citing 18 U.S.C. § 3600(a)(1), (5)-(7)). The court of appeals in this case, however, determined that respondent satisfied both of those conditions. Specifically, it found that respondent "maintains his factual innocence." 521 F.3d at 1121. And it further determined that respondent's request was material, because he had established a "reasonable probability that, if exculpatory DNA evidence were disclosed to [him], he could . . . affirmatively prove that he is probably innocent." *Id.* at 1134 (internal quotation marks omitted). The decision below therefore does not call into question the legitimacy of either of those conditions.

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[4] *Medina v. California*, 505 U.S. 437 (1992) is not an obstacle to recognizing a right of access to DNA evidence. In determining the scope of the government's disclosure obligations, this Court considers the Due Process principles underlying *Brady*; it does not conduct a separate *Medina* analysis. *United States v. Ruiz*, 536 U.S. 622, 631 (2002). But even applying a *Medina* analysis, withholding DNA evidence necessary to establish an actual innocence claim violates the same fundamental principle of justice that underlies *Brady*: that "the innocent go free." *Herring*, 422 U.S. at 862.

While petitioners invoke these federal statutory conditions, in reality, they seek to establish two far more onerous conditions. Both would place serious and unjustified obstacles in the path of persons seeking to establish their innocence and therefore violate Due Process.

First, petitioners contend that a state may deny access to a person who has previously confessed to the crime. *See* Petr. Br. 53. But as petitioners surely know, there are numerous reasons that an innocent person might confess guilt, including a fear that he might be unable to persuade a jury of his innocence, a desire to avoid more serious charges, or a hope that such a confession might speed his release. Moreover, in light of the experience with DNA testing, such a condition simply cannot be justified—a full quarter of the 232 post-conviction DNA exonerations involved false confessions and incriminating statements. *See* Innocence Project Facts; *see also* Kreimer & Rudovsky, *supra*, at 547-48 (describing case of Bruce Godschalk, who was convicted of sexual assault following a detailed confession, but later was completely exonerated by DNA evidence).

Second, petitioners contend that a request for testing may be denied when the existing evidence "convincingly establishes" guilt. Petr. Br. 54. That condition also unduly burdens a person seeking to establish his actual innocence. By definition, when a person has been convicted, the existing evidence is sufficient to establish his guilt beyond a reasonable doubt. To use that evidence as a basis for denying the request for access would threaten to undo the right of access altogether. Moreover, petitioners' proposed condition once again ignores the experience

with DNA testing. As the Ninth Circuit explained, "recent history has shown" that "DNA evidence has the capability of refuting otherwise irrefutable inculpatory evidence." 521 F.3d at 1141; *see* Resp. Br. 3, 48.

Accordingly, the key question is not whether the existing evidence provides convincing proof of guilt, but whether DNA testing holds the potential to exonerate the person seeking access to DNA evidence. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (compelling disclosure of confidential agency file even though it was impossible to say at that stage whether the evidence would be exculpatory). No matter how strong the existing evidence appears, if a favorable DNA test could conclusively exonerate the person seeking to establish his innocence, there is no justification for denying access to the DNA evidence. In this case, petitioners have conceded that a favorable DNA test could conclusively establish respondent's innocence. Cert. Reply Br. 8. In these circumstances, at least, denying access to the DNA evidence violates Due Process.[5]

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[5] Congress and state legislatures have established a number of other conditions on access. There is no need in this case to determine the validity of those conditions. The Alaska legislature has not enacted any of those conditions. And petitioners in this case are not relying on any of them. *See* Petr. Br. 52-54 (relying solely on the two proposed conditions discussed above).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, et al.,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF CALIFORNIA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, WYOMING AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does the Due Process Clause confer a broad federal right to postconviction DNA testing, cognizable under 42 U.S.C. § 1983, that overrides comprehensive and meaningful state and federal postconviction DNA testing statutes nationwide?

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INTEREST OF AMICI CURIAE

Forty-four states, in addition to the Federal Government, have enacted postconviction DNA testing statutes. Other states provide alternative rules and procedures for pursuing such testing. The Ninth Circuit's broad right to postconviction DNA testing enforceable in 42 U.S.C. § 1983 actions undermines these effective and carefully-crafted state procedures, improperly overrides legislative judgments, and unnecessarily encourages federal bypass of state-law remedies. It also interferes with the finality of state criminal judgments and misallocates judicial resources by transforming federal district courts into routine arbiters of fact-specific DNA discovery disputes better entrusted to state trial courts.

SUMMARY OF ARGUMENT

Recognizing the importance of postconviction DNA testing, most state legislatures and the United States Congress have enacted comprehensive statutes that provide convicted offenders a meaningful opportunity to seek such testing in appropriate cases. Many of these state laws are modeled on the federal procedure set forth in 18 U.S.C. § 3600. Alaska and several other states provide reasonable non-statutory opportunities for testing. These state procedures allow convicted felons a fair opportunity for postconviction DNA testing while prudently enforcing limiting criteria that minimize wasteful and irrelevant testing. There is no legal foundation for the Ninth Circuit's reading of the Due Process Clause to require a less discriminate procedure, enforceable in § 1983 actions, that would supersede this national body of legislation.

The availability of DNA technology does not justify federal override of state postconviction discovery procedures. DNA testing is not a crystal

ball of guilt or innocence. It is, instead, a form of discovery the probative value of which depends upon the facts of any given case. In many cases, DNA testing after conviction would be a meaningless exercise. Even in seemingly meritorious cases, as the Ninth Circuit acknowledged, "there is a significant chance that the results [of DNA testing] will either confirm or have no effect on the validity of [a defendant's] confinement." *Osborne* v. *District Attorney's Office*, 423 F.3d 1050, 1054 (9th Cir. 2005) (*Osborne I*).

The Ninth Circuit's decision also misinterprets the Constitution's limited application to state postconviction procedures and violates principles of federalism and judicial restraint. Legislatures, not the federal judiciary, should take the lead in evaluating the proper role for identification technology in facilitating collateral attack on otherwise final state judgments. Accordingly, a claim for postconviction DNA testing under § 1983 should not be cognizable where a state itself already provides a meaningful opportunity for such testing.

ARGUMENT

I. STATE AND FEDERAL POSTCONVICTION DNA TESTING LAWS PROVIDE MEANINGFUL OPPORTUNITIES TO GENERATE EVIDENCE OF INNOCENCE

In accord with legislatures across the country, this Court observed in *House* v. *Bell*, 547 U.S. 518, 540 (2006), that DNA evidence can be of "central importance" to postconviction litigation concerning actual innocence. The necessity for a meaningful opportunity to obtain postconviction DNA testing in appropriate cases is not in dispute. However, most convicted offenders who would seek DNA testing in a § 1983 action would be pursuing a "second bite at the apple" with a different judge after being denied testing under applicable state or federal laws. The

Ninth Circuit's ruling in *District Attorney's Office* v. *Osborne*, 521 F.3d 1118 (9th Cir. 2008) (*Osborne II*), encouraging such challenges notwithstanding state process, ignored proper constitutional limits on judicial prerogatives and prudential limits on appropriate postconviction DNA testing.

A. The states have enacted carefully-crafted and effective DNA testing procedures

1. As of January 1, 2009, forty-four states, as well as the Federal Government, will have enacted statutory postconviction DNA testing procedures.[1] Of

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[1] 18 U.S.C. § 3600; Ariz. Rev. Stat. Ann. § 13-4240 (LexisNexis 2008); Ark. Code Ann. §§ 16-112-202 to -208 (2008); Cal. Penal Code § 1405 (Deering 2008); Colo. Rev. Stat. §§ 18-1-411 to -416 (2008); Conn. Gen. Stat. § 54-102kk (2008); Del. Code. Ann. tit. 11, § 4504 (2008); D.C. Code Ann. § 22-4133 (LexisNexis 2008); Fla. Stat. Ann. §§ 925.11 to 925.12, 943.3251 (LexisNexis 2008); Ga. Code Ann. § 5-5-41(c) (2008); Haw. Rev. Stat. Ann. §§ 844D-121 to -133 (LexisNexis 2008); Idaho Code Ann. § 19-4902(b)-(f) (2008); 725 Ill. Comp. Stat. Ann. 5/116-3 (LexisNexis 2008); Ind. Code Ann. §§ 35-38-7-1 to -19 (LexisNexis 2008); Iowa Code § 81.10 (2008); Kan. Stat. Ann. § 21-2512 (2006); Ky. Rev. Stat. Ann. § 422.285 (LexisNexis 2008); La. Code Crim. Proc. Ann. art. 926.1 (2008); Me. Rev. Stat. Ann. tit. 15, §§ 2137-2138 (2008); Md. Code Ann., Crim. Proc. § 8-201 (LexisNexis 2008); Mich. Comp. Laws Serv. § 770.16 (LexisNexis 2008); Minn. Stat. § 590.01(1a) (2008); Mo. Rev. Stat. §§ 547.035, .037 (2008); Mont. Code Ann. § 46-21-110 (2008); Neb. Rev. Stat. Ann. §§ 29-4116 to -4125 (LexisNexis 2008); Nev. Rev. Stat. Ann. § 176.0918 (LexisNexis 2008); N.H. Rev. Stat. Ann. § 651-D:2 (LexisNexis 2008); N.J. Stat. Ann. § 2A:84A-32a; N.M. Stat. Ann. § 31-1A-2 (LexisNexis 2008); N.Y. Crim. Proc. Law § 440.30(1-a) (Consol. 2008); N.C. Gen. Stat. §§ 15A-269 to -270.1 (2008); N.D. Cent. Code § 29-32.1-15 (2008); Ohio Rev. Code Ann. §§ 2953.71-2953.82 (LexisNexis 2008); Or. Rev. Stat. §§ 138.690 to .696 (2007); 42 Pa. Cons. Stat. Ann. §

(continued...)

the remaining six states—Alabama, Alaska, Massachusetts, Mississippi, Oklahoma, and South Dakota—most have set forth analogous procedures and standards in case law and other postconviction discovery rules.[2] DNA testing is available in federal habeas corpus proceedings as well upon a showing of good cause. See, *e.g.*, *In re Braxton*, 258 F.3d 250, 255 (4th Cir. 2001).

Postconviction DNA testing laws nationwide recognize that the opportunity to generate accurate and objective identification evidence enhances the integrity of the criminal justice system. At the same time, legislatures have taken care to construct effective statutory filters to ensure that testing will

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9543.1 (2008); R.I. Gen. Laws § 10-9.1-12 (2008); 2008 S.C. Acts 413 (to be codified at S.C. Code Ann. §§ 17-28-10 to -120 (effective Jan. 1, 2009)); Tenn. Code Ann. §§ 40-30-301 to 313 (2008); Tex. Code Crim. Proc. Ann. arts. 64.01-.05 (2007); Utah Code Ann. §§ 78B-9-301 to -304 (2008); Vt. Stat. Ann. tit. 13, §§ 5561-5570 (2007); Va. Code Ann. § 19.2-327.1 (2008); Wash. Rev. Code Ann. § 10-73-170 (LexisNexis 2008); W. Va. Code Ann. § 15-2B-14 (LexisNexis 2008); Wis. Stat. § 974.07 (2007); Wyo. Stat. Ann. §§ 7-12-303 to -315 (2008).

[2] See, *e.g.*, *Fagan* v. *State*, 957 So. 2d 1159, 1159 (Ala. Ct. Crim. App. 2007) ("the need for postconviction DNA testing may be presented in a Rule 32 [postconviction discovery] petition"); *Osborne* v. *State*, 110 P.3d 986, 995 (Alaska Ct. App. 1995) ("[A] defendant who seeks postconviction DNA testing must, at a minimum, meet the three-part test endorsed by the state courts . . . ."); *Grayson* v. *State*, 879 So. 2d 1008, 1017 n.4 (Miss. 2004) (leaving open the possibility of a valid non-statutory request for postconviction DNA testing); *Jenner* v. *Dooley*, 590 N.W. 2d 463, 472 (S.D. 1999) (setting forth specific guidelines governing requests for postconviction DNA testing); Mass. R. Crim. P. 30(c)(4) (2008) (authorizing discovery attendant to claim for postconviction relief and encompassing DNA testing per 2001 revision Reporter's Notes).

occur in truly meritorious cases but not in the many others where DNA testing would be a pointless and wasteful exercise. See, *e.g.*, *State* v. *Reldan*, 861 A.2d 860, 865 (N.J. Super Ct. 2004) (postconviction DNA testing of hairs in defendant's car not warranted because "at best it might indicate that those particular hairs were not those of either or both of the victims, something that would not change the jury's verdict"). The Ninth Circuit's federal cause of action for postconviction DNA testing incorporates no such balance.

California's experience is illustrative. In the year following enactment of California's postconviction DNA testing statute, the California Innocence Project reviewed more than 1,400 inmate cases. Daniel Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 Neb. L. Rev. 1097, 1116, n.71 (2003). This number does not include the unknown but possibly significant number of prisoner inquiries to public defenders and private defense attorneys throughout the State. In contrast to the Ninth Circuit's broad pronouncement, had California's law not established reasonable criteria designed to filter out cases inappropriate for DNA testing there likely would have been an unmerited and onerous degree of litigation in response to inmate motions.

Nationally, there are more than one million felony convictions every year. William Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 2028 n.275 (2008). The Innocence Project reports receiving "about 3,000 requests now a year for post-conviction DNA testing . . . ." Hearing on DNA Forensics Initiatives Before the Subcomm. On Crime, Terrorism and Homeland Security of the H. Comm. On the Judiciary, 110th Cong. (April 10, 2008) (testimony of Peter Neufeld, Co-Founder and Co-Director, Innocence Project). There thus exists an enormous population of convicted felons, many of whom may perceive DNA testing as a means of improperly prolonging litigation and injecting a degree of

unfounded doubt into final judgments. Without effective filtering criteria, meritorious cases would have to stand in line behind cases unsuitable for testing, delaying the administration of justice.

Legislators have long recognized the importance of a measured, balanced approach to postconviction DNA testing. In 2000, for example, the United States Congress discussed the need for federal legislation authorizing postconviction DNA testing "only in cases in which testing has the potential to prove the prisoner's innocence[, because t]his standard will allow testing in potentially meritorious cases without wasting scarce prosecutorial and judicial resources on frivolous cases." 146 Cong. Rec. S9467 (daily ed. Sept. 28, 2000) (statement of Sen. Hatch). The Director of the National Institute of Justice echoed the need for calibrated legislation:

> [E]xperience also points to the need to ensure that postconviction DNA testing is appropriately designed so as to benefit actually innocent persons, rather than actually guilty criminals who wish to game the system or retaliate against the victims of their crimes. Frequently, the results of postconviction DNA testing sought by prisoners confirm guilt, rather than establishing innocence. In such cases, justice system resources are squandered and the system has been misused to inflict further harm on the crime victim.

149 Cong. Rec. S14046 (daily ed. Nov. 5, 2003) (statement of Sen. Kyl, quoting Sarah Hart, Director, NIJ); see, *e.g.*, *Cooper* v. *Brown*, 510 F.3d 870 (9th Cir. 2007) (detailing how extensive postconviction DNA testing confirmed that the convicted defendant was indeed the perpetrator). Jurisdictions nationwide have enacted effective DNA testing laws that address and achieve this balance.

2. The ultimate product of congressional deliberation on this issue, the Innocence Protection

Act of 2004 (IPA), was enacted after "years of work." 150 Cong. Rec. S11610 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy); Pub. L. No. 108-405, §§ 413-432, 118 Stat. 2260, 2278-2293 (2004) (tit. IV of the Justice For All Act of 2004). Codified at 18 U.S.C. § 3600, the federal postconviction DNA testing statute requires a threshold showing that "was the subject of intense negotiations, as members recognized that setting the standard too low could invite frivolous applications, while setting it too high could defeat the purpose of the legislation and result in grave injustice." 150 Cong. Rec. S11611 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy). Further, § 3600 provides "additional disincentives to filing false claims or trying to 'game the system.'" *Id.*

Section 3600, is, by design, the substantive and procedural model for its state counterparts. IPA § 413 (note to 42 U.S.C. § 14136 (2008), "Incentive Grants To States To Ensure Consideration Of Claims Of Actual Innocence"). Section 413 of the IPA provides federal grant funding—for law enforcement education and training, DNA research and development, missing-persons DNA programs, and postconviction DNA testing—only to those states affording convicted felons the opportunity to pursue postconviction DNA testing. *Id.* State postconviction DNA testing statutes enacted before the IPA took effect must provide such testing "to persons convicted after trial and under a sentence of imprisonment or death for a State felony offense, in a manner that ensures a reasonable process for resolving claims of actual innocence." *Id.* § 413(2)(A)(i). States lacking a postconviction DNA testing statute as of October 30, 2004, must develop a postconviction DNA testing procedure "comparable to section 3600(a)" in order to receive the specified grant funding. *Id.* § 413(2)(A)(ii). In addition, qualifying state laws must "permit[] the applicant to apply for postconviction relief, notwithstanding any provision of law that would otherwise bar such application as

untimely" if the DNA test results exclude the applicant. *Id.*

The IPA grants states "some flexibility in crafting their DNA laws. State procedures for providing postconviction DNA testing and preserving biological evidence need only be 'comparable,' not identical, to the federal procedures in sections 3600 and 3600A . . . ." 150 Cong. Rec. S11612 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy). As the general template for postconviction DNA testing legislation nationwide enacted in the last four years, § 3600 incorporates the basic features of its state law analogues. See also Brandon Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629 app. (2008) (state-by-state listing of core provisions of postconviction testing laws). The following are key elements of § 3600 and, by extension, many state statutes:

First, only currently incarcerated felons, including those sentenced to death, may request DNA testing. 18 U.S.C. § 3600(a); but see, *e.g.*, *People* v. *Schultz*, 799 N.E. 2d 930 (Ill. App. Ct. 2003) (Illinois statute affords postconviction DNA testing also to those who have completed their sentences). This avoids expenditure of judicial resources on testing for those who have served their sentences and thus lack an interest in release from custody. It also prevents those convicted of misdemeanors from placing an undue burden on courts, attorneys, and laboratories.

Second, if the applicant asserts under penalty of perjury that he is actually innocent, DNA testing may be sought in the case forming the basis for the current conviction, or another state or federal conviction used to enhance the current sentence. § 3600(a)(1).

Third, the motion for testing is made to the trial court "that entered the judgment of conviction." § 3600(a). These judges, having presided over the trial proceedings, are in the best position to assess the value of DNA testing in light of the facts of the case and evidence of guilt. Cf. *Watts* v. *United States*, 841 F.2d 275 (9th Cir. 1988) (trial judge who presided over the plea hearing was in the best position to evaluate a

motion to set aside the plea); see also Cal. Penal Code § 1405(f)(5) (permitting court to assess the DNA testing motion "in light of all the evidence . . . whether or not it was introduced at trial"). Subsequent review by a federal district court based on a cold or partial record would lack the same familiarity with the facts and knowledge of the entire case.

Fourth, the chain of custody attributable to the biological evidence at issue must be intact, "to ensure that [the evidence to be tested] has not been substituted, contaminated, tampered with, replaced, or altered in any [material] respect . . . ." § 3600(a)(4). DNA test results excluding the defendant as a source would be meaningless if there is indication that the evidence collected from the crime scene is not the same evidence, or in the same condition, as the evidence submitted for postconviction testing. See, *e.g.*, *Middlebrook* v. *State*, 918 A.2d 1170, 1170 (Del. 2007) (pointing to evidence item's "contamination by multiple handlings of several police officers, prosecutors, court personnel and the jury" in affirming denial of postconviction testing); accord, *United States* v. *Ivory*, 396 F. Supp. 2d 1253, 1258 (D. Kan. 2005) (citing expert witness testimony that "studies have shown that 'the major contributor [of DNA on an object] is generally the last person that handled' the object"). Especially in old cases where items may have been collected, handled, or stored without regard to the preservation of biological evidence, it is prudent for these issues to be taken into account.

Fifth, testing is precluded where the identity of the perpetrator was not an issue at trial. § 3600(a)(7). An Illinois appellate court explained:

> [O]ur legislature wanted postconviction forensic testing to occur only in those cases where such testing could discover new evidence at sharp odds with a previously rendered guilty verdict *based upon criminal acts that the defendant*

> *denied having engaged in.* Our legislature did not want convicted defendants who admitted at their trial to the commission of the acts charged, and did not contest the question of who committed those acts, to make a mockery of the criminal justice system and the statute's grace. It did not want defendants who tendered unsuccessful affirmative defenses at their trial to later disavow the commission of the acts charged, just so they could obtain postconviction testing of evidence meaningless to how they contested their guilt.
>
> Where a defendant contests guilt based upon self-defense, compulsion, entrapment, necessity, or a plea of insanity, identity ceases to be the issue.

People v. *Urioste*, 736 N.E. 2d 706, 714 (Ill. App. Ct. 2000) (emphasis in original).

Sixth, the physical evidence to be tested must be material to the issue of the perpetrator's identity. § 3600(a)(8); see *Richardson* v. *Superior Court*, 183 P.2d 1199, 1204 (Cal. 2008) (interpreting the California postconviction DNA testing law's "materiality" requirement to mean evidence that is "relevant to the issue of identity"). Where the absence of the defendant's DNA on an evidence item would have been unsurprising or insignificant at trial, testing is not merited. See, *e.g.*, *People* v. *Savoy*, 756 N.E. 2d 804, 811 (Ill. 2001) (bloodstain was not materially relevant to innocence claim because it was only minor collateral evidence at trial). For example, under this criterion cigarette butts found on the ground near a homicide scene in a public park generally would not be subjected to postconviction testing absent a showing that they had been smoked by the killer.

Seventh, the court must find that DNA test results may "raise a reasonable probability" that the

applicant is innocent of the charged offense. § 3600(a)(8)(B), 3600(a)(6)(B); see *Richardson* v. *Superior Court*, 183 P.2d at 1205 (citing *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984), and holding that "reasonable probability" in this context refers to "a reasonable chance and not merely an abstract possibility . . . that the defendant would have obtained a more favorable result [at trial]"); but see *Anderson* v. *State*, 831 A.2d 858, 866-67 & nn.17 & 21 (Del. 2003) (noting that some states have adopted more lenient standards than "reasonable probability"). This criterion ensures that access to evidence after trial is no greater than access to evidence before trial. Cf. *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995).

This standard also appropriately forecloses DNA testing in cases where there is no reasonable probability that the absence of the convicted felon's DNA, or the victim's, would constitute proof that the convicted felon was not a perpetrator. See, *e.g.*, *Rivera* v. *State*, 89 S.W. 3d 55, 60 (Tex. Ct. Crim. App. 2002) (affirming the denial of postconviction DNA testing in part because, 18 hours after the crime, the presence of the victim's DNA under the defendant's fingernails could indicate guilt, but its absence would not indicate innocence). The purpose of postconviction DNA testing "is to establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possibly been perpetrated by a phantom defendant." *Alley* v. *State*, No. W2004-01204-CCA-R3-PD, 2004 Tenn. Crim. App. Lexis 471, at *25 (Tenn. Ct. Crim. App. May 26, 2004), cert. den., *Alley* v. *Tennessee*, 544 U.S. 950 (2005).

For example, in a multiple-perpetrator sexual assault case, a vaginal swab collected from the victim during a post-event examination would not necessarily meet the "reasonable probability" threshold. The absence of any one perpetrator's DNA on the swab would not exculpate him. It would demonstrate only that his cellular material was not on that particular swab. See, *e.g.*, *Galloway* v. *State*, 802

So. 2d 1173, 1174 (Fla. Ct. App. 2001) ("The fact that only appellant's co-defendants may have deposited DNA at the crime scene or on the body of the victim does not mean that appellant was not there."); *People* v. *Gholston*, 697 N.E. 2d 375, 421 (Ill. App. Ct. 1998) (denying postconviction DNA testing because the absence of the applicant's DNA on a swab would not be exculpatory where "there were multiple defendants who participated in the sexual assault, one or more of whom may have ejaculated").

A theory of innocence based on exclusionary DNA test results should not be fueled by "what if's," assumptions, and possibilities. A testing standard that invites such creative speculation is no standard at all. In another context, this Court rejected a "conceivable benefit" test used by a lower court to evaluate whether the deportation of potential defense witnesses violated a defendant's right to compulsory process guarantees by the Sixth Amendment: "Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have 'conceivably benefited' the defense. To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel." *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 866-67 (1982). Rather, a defendant denied access to potential witnesses would have to make "at least" a "plausible showing of how their testimony would have been both material and favorable to his defense." *Id.* at 867.

Eighth, DNA testing may occur only if no testing was conducted previously, or if improved testing procedures have become available. § 3600(a)(3). If no DNA testing was conducted previously, that opportunity must not have been waived or declined knowingly. § 3600(a)(3)(A)(i)-(ii). This requirement avoids redundant and repetitive motions for testing.[3]

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[3] This requirement also likely would preclude testing in Respondent Osborne's case because Osborne knowingly and for

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In addition, the federal statute resolves questions of notice, § 3600(b), selection of laboratory, § 3600(c)(1)-(2), testing technology employed, § 3600(a)(5), payment of costs, § 3600(c)(3), and disclosure of results, § 3600(e).[4] It also provides for sanctions should the applicant's claim of innocence prove false in light of inculpatory DNA test results. § 3600(f)(2). In short, § 3600 is comprehensive and fair. It is designed to facilitate DNA testing in appropriate cases and filter out requests which, if pursued, would only delay justice and prevent closure for victims. And, in part due to the strong financial incentives built into the Innocence Protection Act of 2004, it has become a national model for this type of legislation.

B. The Ninth Circuit's holding is not a reasonable balancing of the interests implicated by postconviction DNA testing

Beyond its constitutional flaws discussed in Section II, below, the postconviction right to DNA testing created by the Ninth Circuit fails because it lacks the reasonable parameters and limitations integrated into federal and state laws. Most significantly, the Ninth Circuit placed a ceiling, but no floor, on the showing a convicted offender must make to obtain DNA testing: "[T]he standard of materiality applicable to Osborne's claim for postconviction access

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strategic reasons refused a highly discriminating DNA test available at the time of his trial. *Osborne II*, 521 F.3d 1118, 1123 & n.2.

[4] Unlike the federal statute, some state laws provide also for appointment of counsel to indigent defendants for investigation and preparation of a motion for postconviction DNA testing. See, *e.g.*, Cal. Penal Code § 1405(b); Conn. Gen. Stat. § 54-102kk(e).

to evidence is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed . . . , he could prevail in an action for postconviction relief." *Osborne II*, 521 F.3d 1118, 1134. Because the Ninth Circuit left open the possibility of a more lenient standard, effective state or federal postconviction DNA testing laws may be stricken as violating constitutional protections if they require a predicate showing of "reasonable probability."

As a practical matter, specious requests for wasteful postconviction DNA testing filtered out under existing federal and state laws would reappear as § 1983 actions under the Ninth Circuit's expansive reading of the Due Process Clause.[5] This already has occurred in other circuits. In *McKithen* v. *Brown*, 565 F. Supp. 2d 440 (E.D.N.Y. 2008), for example, McKithen was convicted of stabbing his wife. 565 F. Supp. 2d at 445. At trial, he did not contest that his wife had been stabbed, but argued that a third party committed the act. *Id.* Following his conviction, McKithen sought DNA testing of the knife under New York's postconviction testing statute to determine if the victim's blood was on the knife. *Id.* at 445-46. The state trial court denied the request because, given the defense at trial, "the presence or absence of [the victim's] blood on the knife would have little or no probative value in determining whether her wounds

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[5] Whether such suits brought under § 1983 would violate principles of issue preclusion or claim preclusion would depend upon a number of factors, including the precise contours of a constitutional right to postconviction DNA testing, should one exist, relative to the standards applied by state trial courts. *See Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 (2008) (describing issue preclusion and claim preclusion). The Ninth Circuit's rule also may invite violation of the *Rooker-Feldman* doctrine by turning district courts into de facto courts of review following state court denials of requests for DNA testing. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983).

were inflicted by McKithen." *Id.* at 446. McKithen then filed a § 1983 action seeking the DNA testing. *Id.* at 446. Holding his claim to be constitutionally cognizable, the district court granted relief and ordered testing of the knife. *Id.* at 495.

As *McKithen* demonstrates, the needless litigation and associated squandering of fiscal and human resources feared by legislators is a foreseeable consequence of affirming the Ninth Circuit. State prosecutors would be forced to spend considerable time defending federal civil rights lawsuits, and federal trial courts would see their dockets expand accordingly. Most of those lawsuits would lack merit, because viable requests for DNA testing would have been granted or stipulated to under measured state law guidelines.

Finally, it is not clear that the Ninth Circuit's holding is limited to postconviction DNA testing requests. While *Osborne II* ostensibly addressed the constitutionality of postconviction DNA testing, the principles underlying the holding apply, potentially, to an unlimited range of other postconviction discovery. As the Ninth Circuit noted without qualification, "[t]he more novel question presented in this case is whether, and the extent to which, the Due Process Clause of the Fourteenth Amendment extends the government's duty to disclose (or the defendant's right of access) to *post-conviction* proceedings." *Osborne II*, 521 F.3d 1118, 1128 (emphasis in original). Consequently, affirming *Osborne II* would serve as an invitation to state prisoners to file postconviction discovery motions seeking a virtually unlimited range of materials and evidence, including unproven or unreliable scientific techniques that state and federal courts would then have to assess in the first instance.

Thus the Ninth Circuit's creation of a new constitutional requirement was unnecessary and, in any event, ineffective. Most states already have balanced relevant interests and conferred fair and meaningful process for postconviction access to

biological evidence. In those states, only convicted felons dissatisfied with the outcome of that process would potentially benefit from the Ninth Circuit's less structured rule. The interests of other stakeholders in the criminal justice system would be correspondingly devalued.

II. THE CONSTITUTION DOES NOT GUARANTEE A FREESTANDING RIGHT TO POSTCONVICTION DNA TESTING BEYOND THAT AVAILABLE THROUGH MEANINGFUL STATE PROCESS

Postconviction DNA testing does not qualify for special constitutional status. Where meaningful State process exists for incarcerated felons to pursue postconviction DNA testing, the Due Process Clause does not mandate any right to such testing cognizable under § 1983. The Ninth Circuit's error in perceiving such a right threatens to nullify the effective and balanced state postconviction procedures discussed above.

A. Any due process-based interest in postconviction access to biological evidence is exceptionally limited

The Fourteenth Amendment's Due Process Clause exerts minimal influence over state criminal discovery practices, particularly in a postconviction context. "[T]he Due Process Clause," this Court observed, "has little to say regarding the amount of discovery which the parties must be afforded." *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973). "'[T]here is no general constitutional right to discovery in a criminal case.'" *Gray* v. *Netherland*, 518 U.S. 152, 168 169 (1996) (quoting *Weatherford* v. *Bursey*, 429 U.S. 545 (1977)). As this Court stated in *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 59 (1987), "[d]efense counsel has no constitutional right to conduct his own search of the State's files to argue relevance."

Of course, criminal defendants can and should have reasonable pretrial access to potentially exculpatory biological evidence for testing purposes. See *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963). Such access is consistent with "the central function of the trial, which is to discover the truth." *Portuondo* v. *Agard*, 529 U.S. 61, 73 (2000). But the Ninth Circuit engaged in an unprecedented expansion of due process guarantees to provide convicted felons with a constitutional right of post-trial access to biological evidence equivalent to or greater than any discovery right possessed before trial, while conceding that "there is a significant chance that the results [of DNA testing] will either confirm or have no effect on the validity of [a defendant's] confinement." *Osborne I*, 423 F.3d 1050, 1054.

Osborne II failed to acknowledge that, after the "decisive and portentous event" of a guilty verdict, the context for considering discovery requests is strikingly different from that before the "main event" of trial. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). The states' strong interest in the finality of their judgments necessitates reasonable restrictions on collateral attacks. See, *e.g.*, 28 U.S.C. § 2254(d) (2008); *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991) (constitutional claims barred by state-law procedural default); *Teague* v. *Lane*, 488 U.S. 288, 309-10 (1988) (new constitutional rules of criminal procedure will not be announced or applied on collateral review out of respect for final judgments); *McCleskey* v. *Zant*, 499 U.S. 467, 492 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system."); see also *Heck* v. *Humphrey*, 512 U.S. 477, 485 (1994) (expressing "concerns for finality and consistency" and recognizing that the Court "has generally declined to expand opportunities for collateral attack").

Consequently, postconviction due process rights and remedies in state proceedings are very limited. *E.g.*, *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S.

272, 282-84 (1998) (no due process right to specific state clemency procedures); *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) (due process does not require states to provide counsel to capital defendants seeking postconviction relief). In *Pennsylvania* v. *Finley*, 481 U.S. 551, 559 (1987), this Court rejected the premise that "where a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." It is legally suspect to claim that postconviction DNA testing, intended to facilitate collateral attack on a conviction already tested and upheld in trial and appellate proceedings, is a matter of unconditional constitutional entitlement.

B. The Due Process Clause is not violated where the state provides a meaningful opportunity for convicted felons to obtain postconviction DNA testing

Because access to DNA evidence after conviction is discovery linked to a claim of innocence, the Constitution should require access to potential evidence of actual innocence only to the same degree that it requires states to provide an avenue to process a claim of actual innocence. Were it otherwise, a "right" to DNA testing after trial could end up as an illogical orphan of constitutional jurisprudence, disconnected from any corresponding "right" to relief based on the DNA testing.

In *Herrera* v. *Collins*, 506 U.S. 390 (1993), this Court addressed whether and the extent to which the Constitution would recognize a freestanding actual innocence claim. That analysis is equally applicable to DNA testing attendant to such claims. Nothing in *Herrera* supports the existence of a separate constitutional right to postconviction DNA testing where there is a meaningful state avenue available to process a testing claim. In *Herrera*, the Court noted that under some circumstances a "truly persuasive

demonstration of 'actual innocence'" might be cognizable as a freestanding claim in a federal habeas proceeding "if there were no state avenue open to process such a claim." 506 U.S. at 417; accord, *House* v. *Bell*, 547 U.S. 518, 554. The Constitution, therefore, should not compel consideration of a postconviction DNA testing request where a meaningful state procedure exists to process that request.

Section 1983 "is not itself a source of substantive rights," but rather provides "a method for vindicating federal rights elsewhere conferred . . . ." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). Any § 1983 remedy, therefore, is available only to the same limited extent that the Due Process Clause affords postconviction DNA testing rights to prisoners. Accordingly, a § 1983 complaint alleging the unconstitutional denial of access to evidence for postconviction DNA testing should not be cognizable absent a valid allegation that state-law process is so arbitrary, discriminatory, or ineffective as to amount to a pretextual means of denying testing in meritorious cases.

C. Principles of federalism and judicial restraint preclude recognition of a constitutional right to postconviction DNA testing in competition with existing state laws

Principles of federalism and judicial restraint also counsel against a constitutional mandate that would displace carefully calibrated state legislative approaches to postconviction DNA testing. The codification of postconviction DNA testing procedures exemplifies federalism, in which states "'serve as laboratories for testing solutions to novel legal problems.'" *Smith* v. *Robbins*, 528 U.S. 259, 275 (2000).

Contrary to the Ninth Circuit's approach in this case, courts should avoid "imposing a single solution

on the States from the top down" in the realm of criminal procedure. *Smith* v. *Robbins*, 528 U.S. at 274-75 (citing examples of deference to state pre-trial and postconviction procedures). Particularly when considering the integration of technological advances into postconviction proceedings, legislators and other state policymakers are presented with a complex and intricate range of options. "[J]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures." *Murray* v. *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring); see also *Spencer* v. *Texas*, 385 U.S. 554, 564 (1967) (the Constitution "has never been thought [to] establish this Court as a rule making organ for the promulgation of state rules of criminal procedure"); *Medina* v. *California*, 505 U.S. 437, 445-46 (1992) (the Due Process Clause grants "substantial deference to legislative judgments" given the states' "considerable expertise in matters of criminal procedure and the criminal process"). Legislative innovation should be encouraged, particularly in response to new developments in technology that may aid the truth-finding function of the criminal process.

The precise parameters of postconviction procedures require careful legislative balancing of interests in light of available technology: "There are often trade-offs to be faced when science advances. Scientific progress frequently presents questions of resource allocation, interpretation, application, privacy, and ethics. Balances must be struck between societal risks and benefits, between alternative ways of understanding and employing new techniques, and between permissible and impermissible uses." *Harvey* v. *Horan*, 285 F.3d 298, 301 (4th Cir. 2002) (Wilkinson, C.J., concurring). Affirming the Ninth Circuit by constitutionalizing this application of DNA science would, "in the face of all this legislative activity and variation, . . . evince nothing less than a loss of faith in democracy." *Id.* at 303.

As components of postconviction criminal procedure, DNA testing laws are not subject to a rebalancing of competing interests by the judiciary such as may be undertaken in reviewing procedural due-process claims under *Matthews* v. *Eldridge*, 424 U.S. 319 (1976). As this Court held in *Medina* v. *California*, 505 U.S. 437, 443, "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." See also *Herrera* v. *Collins*, 506 U.S. at 407-08. Instead, federalism demands a narrow and deferential inquiry: the Due Process Clause will not proscribe the authority of a state to regulate procedures under its criminal laws unless the state practice "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U.S. at 445 (quoting *Patterson* v. *New York*, 432 U.S. 197, 201-02). In other words, "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Id.* at 445-46. The class of criminal law due process violations is thus defined "'very narrowly'" based on the "'limited operation'" of the Due Process Clause in state criminal law systems. *Id.* at 443 (quoting *Dowling* v. *United States*, 493 U.S. 342, 352 (1990)).

The decision of state legislators to enact postconviction DNA testing laws cannot be said to implicate, let alone offend, some fundamental principle of justice rooted in society's traditions and conscience. To the contrary, the fundamental principle is that legislatures should be accorded the latitude to do so. As Justice Frankfurter observed,

> there is reason for judicial restraint in matters of policy deeper than the value of experiment: it is founded on a recognition of the gulf of difference between sustaining and nullifying

> legislation. This difference is theoretical in that the function of legislating is for legislatures who have also taken oaths to support the Constitution, while the function of courts, when legislation is challenged, is merely to make sure that the legislature has exercised an allowable judgment, and not to exercise their own judgment, whether a policy is within or without "the vague contours" of due process.

American Fed'n of Labor v. *American Sash & Door Co.*, 335 U.S. 538, 555 (1949) (Frankfurter, J., concurring). This case calls for judicial restraint in view of comprehensive state and federal legislation addressing the topic of postconviction DNA testing.

When innocence claims are said to hinge upon scientific evidence, the canons of federalism and judicial restraint necessitate deference to state policymakers' evaluation of the best use of that science in the criminal justice system. To endow any scientific technique with special constitutional status risks the counterproductive consequence that scientific testing will be sought and granted indiscriminately as an end unto itself, rather than being used selectively as a calibrated tool for determining the truth.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: December 31, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Due Process clause creates a right of post-conviction access to DNA evidence.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] For over two centuries, the States have been responsible for regulation of the criminal law. This area of state sovereignty encompasses the process for exonerating the innocent in post-conviction proceedings.

As respondent acknowledges, the question of post-conviction procedure presented in this case "is almost exclusively addressed by state statute, rather than federal constitutional law." Opp. 1. Consequently, creation of a new constitutional right has the potential to supersede many state laws that articulate clear standards for inmates to procure DNA evidence, the concomitant responsibilities of the States to preserve such evidence, and the appropriate remedies for violations thereof. Because fundamental principles of federalism counsel against federal interference in this traditional area of state responsibility, *amici* submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE

Nearly 15 years ago, William Osborne and Dexter Jackson brutally attacked a prostitute, K.G., by forcing her to perform oral sex at gunpoint, raping her, and beating her. Pet. App. 64-65. When they were finished, they shot her and left her for dead.

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

Id. at 66. Following an error-free jury trial in which Osborne and Jackson were tried jointly, both men were convicted of kidnapping, assault, and sexual assault. *Id.* at 116. Osborne was sentenced to 26 years in prison with 5 years suspended. *Id.* at 117.

1. *The evidence against Osborne.* As state and federal courts have recounted, biological, victim-eyewitness, and circumstantial evidence inculpated Osborne. *See id.* at 7. The following account summarizes this evidence.

A day after the attack, K.G. described her assailants and their car in a police interview. *Id.* at 66-67. When Jackson was pulled over by military police several days later for a traffic infraction, he and his car matched composite sketches that had been circulated after the interview. *Id.* During the stop, police observed a gun case in the glove compartment, which provided cause for a subsequent search of the car. *Id.* at 67. Jackson was arrested. *Id.* at 4. He later confessed his involvement in the attack and implicated Osborne as his accomplice.[2] *Id.* at 4, 98; Pet. 3.

A search of Jackson's car yielded a .380-caliber semiautomatic pistol, which ballistics tests later tied to a spent shell casing found at the crime scene, ammunition for the pistol, and K.G.'s perfume and Swiss Army knife. *Id.* at 4, 67-68. Forensic testing determined that blood in Jackson's car matched K.G.'s blood, and fibers from the carpeting of the car matched fibers found on K.G.'s sweater. *Id.* at 67.

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[2] At the time of the traffic stop, another man, James Hunter, was riding in the passenger seat. Pet. App. 5, 94. Because Jackson and Osborne were tried jointly, Jackson's implication of Osborne was not admitted at trial. *See* Pet. 3.

Several other items of evidence specifically linked Osborne to the crime. First, K.G. identified Osborne, as well as Jackson, in separate photographic lineups. *Id.* at 68. Immediately following the attack, K.G. recalled that "two black guys with military . . . haircuts" had attacked her, a description consistent with Osborne's physical appearance.[3] *Id.* at 76. A blue condom recovered at the crime scene contained a pubic hair that was consistent with characteristics of Osborne's pubic hair, but not Jackson's; the passenger, but not the driver, wore a blue condom during the rape. *Id.* at 3, 6, 68. A pubic hair recovered from K.G.'s sweater was likewise consistent with Osborne's pubic hair and not Jackson's. *Id.*

In Jackson's car, police found paper tickets from the arcade where Osborne had been prior to the crime. *Id.* at 7. Prior to the crime, Osborne had twice telephoned Jackson from the arcade where Jackson picked him up. *Id.* at 76. Near the crime scene, police found an axe handle which may have been used to beat K.G. and which was similar to the axe handles that Osborne used in his work. *Id.* at 65, 96. And several witnesses saw Osborne enter Jackson's car before the crime, while others saw Osborne, with blood on his clothing, accompanying Jackson after the crime. *Id.* at 7, 66.

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[3] At trial, Osborne argued that K.G. mistakenly identified him. Pet. App. 7. He cited the fact that K.G. was not wearing her glasses on the night of the attack, that her identification was cross-racial (she was white and he was black), and her description of the passenger who attacked her as being 25 to 30 years old, 6 feet tall, clean shaven, and weighing 180 to 190 pounds; in fact Osborne was 20 years old, weighed 155 pounds, and had a mustache. *Id.*

Finally, DNA from seminal fluid found in the blue condom matched Osborne's DNA. *Id.* at 5. The State tested the DNA using polymerase chain reaction (PCR), *see id.* at 69, and compared the DNA at the DQ Alpha locus, which, "similar to ABO blood typing, reveals the alleles present at a single genetic locus." *Id.* According to the results, Osborne shares the same DQ Alpha type with 14.7 to 16 percent (roughly one-seventh to one-sixth) of African Americans. *Id.* At the same time, because Jackson does not share that DQ Alpha type, the results excluded him as the source. *Id.* Osborne's lawyer decided not to submit the DNA to a more discriminating method of testing that was available at the time. *Id.* at 6.

2. *The defense's decision not to test the DNA.* After the Alaska Court of Appeals affirmed the verdict, *see id.* at 112, Osborne filed for post-conviction relief, alleging that his trial counsel provided him ineffective assistance by failing to subject the DNA in the condom to a more discriminating test. *Id.* at 97; *see* Pet. 4. At the time of Osborne's trial, a highly discriminating method of "reverse fragment length polymorphism" (RFLP) testing was available. Pet. App. 5-6. Like the techniques that Osborne now seeks to utilize, RFLP testing had the potential to exclude him as the source of the sperm.

Before the trial court, Osborne's trial counsel explained that "[g]iven [Jackson's] confession which included Osborne as a perpetrator, and the absence of an air-tight alibi, I believed . . . that insisting on a more advanced . . . DNA test would have served to prove that Osborne committed the alleged crimes." *Id.* at 98. Accordingly, given that the odds based on the State's DNA test were approximately one-in-six that another person was the source of the sperm, Os-

borne's counsel concluded that "Osborne was in a strategically better position without [more specific] DNA testing." *Id.* Moreover, she stated that she had no "present memory" that Osborne desired to have more discriminatory testing performed at the time of his trial. *Id.* at 98-99.

The Alaska Superior Court credited this testimony, ruling that because Osborne's counsel made a "tactical decision" within the "wide range of professionally competent assistance," *id.* at 99-100, Osborne failed to establish a *prima facie* case of ineffective assistance of counsel. *Id.* Osborne sought reconsideration of the order, which the Superior Court denied along with his request to access the DNA evidence for testing. *Id.*

After the Superior Court rejected his application for post-conviction relief, Osborne appealed, filed a §1983 action in federal district court, and applied for discretionary parole. *Id.* at 8, 71. As for his state appeal, in 2005 the Alaska Court of Appeals affirmed the ruling that Osborne had not shown his counsel to be incompetent. *Id.* at 99.

4. *Osborne's due process right under the Alaska Constitution.* At the same time, the Alaska Court of Appeals remanded Osborne's case to the Superior Court in order to determine whether Osborne had a due process right to access the State's DNA evidence for testing. *Id.* at 109-11. Though the Court of Appeals concluded that under federal law, "a defendant who has received a fair trial apparently has no due process right to present new post-conviction evidence," *id.* at 105, the court declined "to hold that Alaska law offers no remedy to defendants who could prove their factual innocence." *Id.* at 110.

The Court of Appeals noted that several state courts had recognized a due process right to obtain post-conviction DNA testing under their state constitutions, and had articulated a three-part test in which a defendant must show (1) that his conviction rested primarily on eyewitness identification evidence, (2) there was demonstrable doubt concerning his identification as the perpetrator, and (3) testing would likely be conclusive as to his innocence. *Id.* at 109-10. The Court of Appeals adopted the same test and remanded to the Superior Court to determine whether Osborne met these criteria. *Id.* at 111.

5. *Osborne's confession to the parole board.* Before the Alaska Court of Appeals remanded his case, Osborne confessed his guilt, orally and in writing, in a 2004 application for parole. *Id.* at 71, 74. In his written confession, he described how his codefendant Jackson picked him up from the arcade and they encountered K.G. soliciting sex. *Id.* at 71 & n.11. Instead of paying her, they forced her to have sex with them at gunpoint, and after they were done, Osborne "ordered [her] to get out of the car." *Id.* When she refused, "he "attempted to physically remove her from the car, and eventually got her out." *Id.* Jackson became enraged that K.G. had defecated in his car and "began to assault her with a stick" while Osborne also kicked and punched her. *Id.* According to Osborne's confession, "[a]fter a few seconds[,]" they stopped, kicked snow on her, and left the scene. *Id.* Osborne did not describe shooting K.G. *See id.* Osborne was denied parole. *Id.* at 8.

On remand, the Superior Court considered Osborne's post-trial confessions along with the evidence from his trial. *Id.* at 72-73. The court found that Osborne did not meet any prong of the three-part

test: his conviction did not rest primarily on K.G.'s identification of him and there was no demonstrable doubt concerning this identification because "extensive other evidence" inculpated Osborne and supported K.G.'s identification. *Id.* at 72-73.

Moreover, DNA testing could not conclusively resolve his innocence. That is, even if a DNA test excluded Osborne as the source of the semen in the condom, the condom could have been coincidentally left at the scene by other people before the police arrived. *Id.* The court observed that the weight of the other evidence, including Osborne's confession, undermined his claim that he was factually innocent. *See id.* at 73. These findings were upheld by the Alaska Court of Appeals. *Id.* at 73-82. Osborne's petition to the Alaska Supreme Court was denied. *Id.* at 10.

6. *Osborne's §1983 claim.* In June 2003, before Osborne had exhausted his state post-conviction remedies, he filed a §1983 action in federal district court. *Id.* at 8. This action, like his state action, was pending at the time he confessed his guilt to the parole board. *Id.* at 8, 10.

Specifically, Osborne sought "release of the biological evidence—the semen and pubic hair from the blue condom and the pubic hair from K.G.'s sweater—and the transfer of such evidence for DNA testing." *Id.* at 11 (quotation marks omitted). Osborne explained that he intended to retest the evidence using short tandem repeat (STR) and mitochondrial DNA (mtDNA) analyses. *Id.* If the tests excluded him as the source of the DNA, he would subsequently use the results to support a freestanding innocence claim in state or federal court. *Id.* at 58.

The federal district court ruled that the proper avenue for Osborne's claim was through a petition for habeas corpus, and dismissed the complaint. *Id.* at 54. The court of appeals reversed, holding that Osborne's claim was not procedurally barred. *Id.* at 52. It remanded to the district court to determine, in the first instance, whether Osborne had a federally protected right to access the DNA evidence. *Id.* at 62. On remand, the district court ruled in favor of Osborne, finding that "*under the unique and specific facts presented*, a very limited constitutional right" afforded Osborne access to the evidence he sought. *Id.* at 49 (emphasis in original).

The court of appeals affirmed. *Id.* at 2. Following the law of the Circuit, which had recognized an extension of due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) to the post-conviction context, *id.* at 15-16, the court held that Osborne was entitled to access the DNA evidence. Doing so, it assumed, would allow him to file a subsequent "freestanding" petition for post-conviction relief on actual innocence grounds. *Id.* at 19, 21.

The court of appeals noted that in Osborne's state proceedings, the Alaska courts had allowed Osborne to pursue the DNA evidence under the Alaska Constitution by using a three-part test that Osborne ultimately failed to meet. *Id.* at 28; *see also id.* at 64. But the court declined to give any weight to the Alaska Court of Appeals' rulings. *Id.* at 28-32. It held that "only the state court's third finding—which is essentially its 'materiality' finding under Alaska law—is in play . . . . But that finding is also not entitled to preclusive effect in this case because it was made in conformity with a materiality standard under state law that is more stringent than any stan-

dard this court would apply under federal law." *Id.* at 30.

SUMMARY OF ARGUMENT

1. There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000). Rules of procedure governing all aspects of the criminal process, including post-conviction proceedings, are a core component of every State's criminal justice system. Statutes specifically governing post-conviction access to DNA evidence for retesting exist in 44 States. Respondent approvingly cites this body of state law, acknowledging that the States have enacted, "in little more than a decade, a broad array of legislation to afford DNA testing to convicted persons." Opp. 8. Two States, Alaska and South Dakota, currently rely on judge-made rules for analyzing inmate DNA petitions.

This Court has frequently said that fundamental concerns of federalism counsel against federal interference with state criminal law and process. It has emphasized that such intrusions undermine both the States' sovereignty and "their good-faith attempts to honor constitutional rights." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). Like this Court, the States are well aware that punishing innocent persons is a gross injustice, and that state courts must take assertions of innocence by convicted persons very seriously. But given their huge inmate populations, state courts cannot grant every petition for post-conviction access for DNA evidence. Doing so would not only undermine the principle of finality of judgments, but would impose substantial other costs.

Weighing these competing concerns is squarely within the competence of state legislatures.

By contrast, the Due Process clause, as applied by the federal courts on a case-by-case basis, does not provide a workable means of accommodating such competing policy considerations. Published federal court opinions, including the opinions below in this case, have found a Due Process right to DNA evidence in a heavily-qualified, fact-specific way. While opening the door to future inmate petitions throughout the Ninth Circuit, the court below provided scant guidance for evaluating those petitions. Such case specificity is unsurprising; what constitutes federal due process is a fact-intensive inquiry that depends upon the demands of the particular situation. Concluding that the States, rather than federal courts, should set the rules for post-conviction access to DNA evidence is thus grounded in recognition of their respective competencies.

2. Inmates such as respondent do not benefit from the presumption of innocence or the requirement that their guilt be proven beyond a reasonable doubt when they seek post-conviction relief. As this Court has repeatedly observed, "[t]he guilt or innocence determination in state criminal trials is 'a decisive and portentous event.'" *Herrera v. Collins*, 506 U.S. 390, 401 (1993). Given such precepts, it is clear that respondent received ample process from the Alaska courts when they carefully considered his petition for DNA evidence.

The Alaska Court of Appeals adopted a three-part test for post-conviction DNA access that had been endorsed by other state courts. On remand, the Superior Court carefully analyzed each part of the test and ruled against respondent. On appeal, the

Alaska Court of Appeals conducted a *de novo* review of the record and affirmed the trial court's judgment denying respondent's petition. Having fully litigated his petition in the Alaska courts, respondent should not be permitted to do so again in the federal courts.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT CREATE A RIGHT OF POST-CONVICTION ACCESS TO DNA EVIDENCE.

The court of appeals erred when it ruled that respondent "has a limited due process right of access to [biological] evidence for purposes of post-conviction DNA testing." Pet. App. 2. Moreover, by making clear that it did not "purport to set the standards by which all future cases must be judged," *id.* at 44, the court below provided scant guidance to future petitioners.

This ruling was inadvisable as well as erroneous: Not only did the Alaska courts give respondent ample opportunity to demonstrate his entitlement to the evidence under a clearly-articulated three-part test, *see id.* at 64, but almost every other State has laws governing post-conviction access to DNA evidence. These state laws, not federal courts construing the Due Process clause, should set the parameters for post-conviction access to DNA evidence. The judgment of the court of appeals should accordingly be reversed.

A. Post-Conviction Remedies Are an Integral Part of State Criminal Procedure That Should Be Determined by States, Not by Federal Courts.

Respondent was convicted of committing brutal crimes against a woman in "a secluded area of Anchorage." Pet. App. 3. "The regulation and punishment of [such] intrastate violence . . . has always been the province of the States." *United States v. Morrison*, 529 U.S. 598, 618 (2000) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821)). "Indeed," the Court added in *Morrison*, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.*; *see also id.* at 618 n.8 (the Constitution's reservation of "a generalized police power to the States is deeply ingrained in our constitutional history") (citations omitted).

Rules of criminal procedure governing all aspects of the criminal process, including post-conviction proceedings, are a core component of every State's criminal justice system. *See, e.g.*, National Conference of Commissioners on Uniform State Laws, Uniform Post-Conviction Procedure Act (1980).[4] The

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[4] The Uniform Post-Conviction Procedure Act (which is available on Westlaw) has been adopted by Idaho, Iowa, Maryland, Minnesota, Montana, North Dakota, Oklahoma, Oregon, Rhode Island, and South Dakota. *See* Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Post-Conviction Procedure Act (1980) (References & Annotations). The other States have adopted their own post-conviction procedures. For example, respondent filed his state-court petition seeking access to DNA evidence pursuant to Alaska Stat. §12.72.020 *et seq.*, Alaska's general post-conviction relief statute. *See* Opp. 5.

purpose of the Uniform Post-Conviction Procedure Act, for example, "is to provide a [state-law] method to develop a complete record to challenge a criminal conviction." *Berlin v. North Dakota*, 698 N.W.2d 266, 269 (N.D. 2005) (citing N.D. Cent. Code Ann. §29-32.1).

Procedures governing post-conviction access to DNA evidence are a component of the post-conviction procedural rules of almost every State. As respondent emphasizes, the rules governing post-conviction access to DNA evidence in state criminal proceedings are "in 2008 . . . almost exclusively addressed by state statute, rather than federal constitutional law." Opp. 1. There is, he argues, a "broad national consensus about the probative value of DNA evidence that has led the states (and Congress) to address the issue—enacting, in little more than a decade, a broad array of legislation to afford DNA testing to convicted persons, and largely obviating the need for the federal courts to hear such claims." *Id.* at 8. At the time respondent's brief in opposition was filed, "forty-three states and the District of Columbia [had] such laws." *Id.* & n.4 (collecting statutory citations from 43 States).[5] Moreover, in several States that

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[5] Since the brief in opposition was filed, South Carolina has adopted a DNA-access statute, raising the current total to 44 states. *See* Access to Justice Post-Conviction DNA Testing Act, S.C. Code §17-28-10 *et seq*. The Alaska Innocence Project is currently lobbying the Alaska legislature to adopt DNA-access laws. *See* Bill Oberly, *Evidence Preservation Should Be Priority*, Anchorage Daily News, April 8, 2008.

Respondent also notes that in 2004 "Congress passed (by overwhelming bipartisan vote) and President Bush signed similar legislation into law," thereby "giv[ing] the nation's more than 200,000 federal prisoners a statutory right to petition for post-conviction DNA testing." Opp. 8-9.

did not have DNA statutes, courts crafted rules for determining the circumstances under which an inmate may obtain access to DNA evidence for retesting. *See* Pet. App. 109-111 & n.27 (collecting cases).[6]

In line with its long-held view that "'the States possess primary authority for defining and enforcing the criminal law,'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)), this Court has frequently noted that fundamental federalism concerns counsel against federal interference with state criminal law and process. *See, e.g.*, *Morrison*, 529 U.S. at 618 (citing *Lopez*, 514 U.S. at 568); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Herrera v. Collins*, 506 U.S. 390, 401 (1993); *Coleman v. Thompson*, 501 U.S. 722, 726, 748 (1991). As the Court reiterated in *Brecht*, "'[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" 507 U.S. at 635 (quoting *Engle*, 456 U.S. at 128).

Following this Court's lead, state courts are well aware that "[p]unishment of the innocent may be the worst of all injustices," and that to "avoid such a grievous outcome courts should solemnly consider reopening a case if a 'truly persuasive' showing of actually innocence lies close at hand." *Jenner v. Dooley*, 590 S.W.2d 463, 471 (S.D. 1999) (quoting *Herrera*, 506 U.S. at 517 and citing *Schlup v. Delo*, 513

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[6] Four States—Massachusetts, Oklahoma, Mississippi, and Alabama—do not have either statutory or judicially-created DNA-access rules. South Dakota, like Alaska, currently relies on case law to provide standards for post-conviction DNA petitions. *See Jenner v. Dooley*, 590 N.W.2d 463, 471-72 (S.D. 1999).

U.S. 298 (1995)). However, it is neither possible nor appropriate that such evidence be made available in response to every request. Setting the parameters for when and how DNA evidence is to be made available requires the weighing of competing interests and is, as respondent recognizes, squarely within the competence of state legislatures. *See* Opp. 1 (DNA access "is almost exclusively addressed by state statute, rather than federal constitutional law"); *id.* at 8-10 & nn.3-8 (collecting state statutes).

Numerous determinations are required to devise standards for post-conviction access to DNA evidence. *See* Ron C. Michaelis et al., A Litigator's Guide to DNA 383-86 (2008). For example, variables include whether inmates seeking only sentence reduction rather than exoneration should be permitted to petition, *id.* at 383, whether petitioners must show that identity was a disputed issue at trial, *id.*, and whether the petitioner must offer new, noncumulative evidence. *Id.* at 384. If there is a "new evidence" requirement, must the evidence not have been available to the defendant at trial? *Id.* If, as in this case, the "new evidence" consists of retesting DNA with a new, more sophisticated technology, how much different must the new testing method be from those available to the defendant at trial? *Id.*

Besides these questions, there are certain safeguards necessary to ensure the integrity of post-conviction DNA testing. These include proof of an unbroken chain of custody of the DNA evidence, time limits for filing a petition, the impact on other remedies available to the petitioner, and the availability of stays. *Id.* at 384-86. These questions in turn raise the issues of whether counsel should be appointed to represent petitioners in some or all cases, and what

the standards should be for determining whether the assistance of counsel has been effective. *Id.* at 386 & nn.52-53 (collecting cases). Finally, retesting DNA evidence necessarily implicates cost questions. *See* Press Release, Office of the Governor of South Carolina, *Governor, NAACP Call for Reconsideration of DNA Bill* (Oct. 28, 2008), *available at* http://www.scgovernor.com/news/releases/10-28-08.htm (DNA testing statute enacted by South Carolina legislature would "require the state to spend $4 million yearly on collecting, analyzing and storing DNA samples").

Unlike state DNA statutes, the Due Process clause has not provided a workable basis for developing such legal standards. Published federal-court opinions that find a Due Process right to DNA do so in a heavily-qualified, fact-specific way. In this case, for example, the Ninth Circuit held that "under the unique and specific facts of this case and assuming the availability of the evidence in question, Osborne has a limited due process right of access to the evidence." Pet. App. 2. While opening the door to future Due Process petitions by convicted defendants, this ruling provides scant guidance for evaluating such petitions. And respondent, represented by a commendable civil rights project dedicated to this issue, candidly acknowledges as much. *See* Opp. 34 ("[I]t bears noting that the decision below was narrowly tailored to limit the scope of its due process ruling only to cases that are at least as compelling on their facts as Osborne's.").[7]

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[7] *See also* Pet. App. 49 (dist. ct. op.) ("there *does* exist, *under the unique and specific facts presented*, a very limited constitutional right to the testing sought") (emphasis in original); *Harvey v. Horan*, 2001 U.S. Dist. LEXIS 9587 (E.D. Va. 2001) ("Due

The fact-specific nature of these Due Process cases is no surprise. "Due process" in a given case is dictated by "such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. 'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.

Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (citations and internal quotation marks omitted). "Neither the term 'due process,' nor the concept of fundamental fairness itself, is susceptible of precise and categorical definition, and no single test can guarantee that a judge will grant or deny habeas relief when faced with a similar set of facts." *Brecht*, 507 U.S. at 639-40 (Stevens, J., concurring).

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process is not a technical conception with a fixed content unrelated to time, place, and circumstances. It is flexible and calls for such procedural protections as the particular situation demands.") (internal citations and quotation marks omitted), *rev'd, Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002); *Harvey v. Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (opinion of Luttig, J., on denial of rehearing) ("As I allude to, this is not at all to say that post-conviction access to evidence for further testing in light of scientific advance is (or ought to be) constitutionally required or permitted as a matter of course or even frequently. It should not be, not only because of the presumption of correctness rightly enjoyed by final judgments of conviction and the separate, indisputable interest in the finality of such judgments, but also because of the reality that only rarely will further testing hold out the possibility that the convicted actually can be proven innocent of the crime.").

Yet given the vast number of potential post-conviction DNA petitions by state inmates,[8] state law, rather than the Due Process clause, is the appropriate source of legal standards. And state legal standards are better equipped to address legal problems such as limits on liability for negligently disposed DNA evidence. *See, e.g.*, S.C. Code §§17-28-110(C); 17-28-360.

Relying on state-law standards is not only the most practical solution to a problem that is far more multi-faceted than initially appears, but also respects the States' sovereign power to devise the rules of criminal procedure that govern their administration of criminal justice and protection of the interests of victims. The judgment of the court of appeals should therefore be reversed.

B. The Alaska Courts Gave Respondent Ample State-Law Process for Obtaining the DNA Evidence He Seeks.

Amici fully respect the desire of convicted persons such as respondent to obtain access to DNA evidence for retesting. For the reasons noted above, however, it is neither possible nor appropriate that such evidence be made available in response to every request. "Punishment of the innocent may be the worst of all injustices. To avoid such a grievous outcome courts should solemnly consider reopening a case if a 'truly persuasive' showing of actual innocence lies close at hand." *Jenner*, 590 N.W.2d at 471 (quoting *Herrera v. Collins*, 506 U.S. 390, 417

[8] According to the Bureau of Justice Statistics, in 2005 an estimated 687,700 state prisoners were incarcerated for violent offenses. U.S. Dep't of Justice, Bureau of Justice Statistics, Summary Findings (2007), http://www.ojp.usdoj.gov/bjs/prisons.htm#findings.

(1993)). But not every inmate who asserts innocence "will be able to reopen a case to analyze old evidence. Our system of justice will hold little respect if its judgments are never final." *Id.* at 472.

While a criminal defendant is presumed innocent until proven guilty and their guilt must be proven beyond a reasonable doubt, *see Herrera*, 506 U.S. at 398-99, a post-conviction petitioner "does not come before the Court as one who is 'innocent,' but . . . as one who has been convicted by due process of law" of a violent felony. *Id.* at 399-400. "'The guilt or innocence determination in state criminal trials is 'a decisive and portentous event.'" *Id.* at 401 (quoting *Wainright v. Sykes*, 433 U.S. 72, 90 (1977)).[9]

Given these precepts of criminal jurisprudence, it is clear that respondent received ample process in the Alaska courts during his post-conviction proceedings. On his direct appeal, the Alaska Court of Appeals reversed the denial of his petition for DNA evidence. It held that "a defendant who seeks post-conviction DNA testing must, at a minimum meet the three-part test endorsed by [other] state courts." Pet. App. 109-111 & n.27 (collecting cases). "That is, the defendant must show (1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." *Id.* at 110-111.

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[9] Because of the fundamental differences between trials and post-conviction proceedings, *Brady v. Maryland*, 373 U.S. 83 (1963), heavily relied upon by the court below, is not applicable to this case. See Pet. Br. 36.

On remand, the Superior Court reviewed the trial record, as well as the two confessions Osborne made to the Parole Board in 2004. *See id.* at 71 & n.11. It ruled that respondent had failed to satisfy this three-part test. *Id.* at 72-73. Respondent appealed and the Court of Appeals conducted a *de novo* review of the record. *See id.* at 77. The court meticulously examined the third prong of the Alaska test—whether further DNA testing would conclusively establish Osborne's guilt or innocence—and found that it would not. *See id.* at 78-82 (citing and quoting *Riofta v. State*, 142 P.3d 193 (Wash. App. 2006) (applying similar inquiry to post-conviction DNA petition)).

Respondent asserts that "the Ninth Circuit appropriately applied the basic protections of the Due Process Clause" to provide him the relief he requested from the State, Opp. 27, notwithstanding the fact that this question was fully litigated in state court. This case thus raises questions not only about whether the Due Process clause requires post-conviction access to DNA evidence, but also about the amount of process to which respondent is entitled.

A recent full faith and credit clause case, *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), is useful in answering that question. In *San Remo*, the plaintiffs asserted that they had a right to relitigate in federal court constitutional claims that had been fully litigated in state court. This Court held that the *San Remo* plaintiffs were not entitled to two bites at the apple. "We have," the Court ruled, "repeatedly held . . . that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal

claims relitigated in federal court. . . . The relevant question in such cases is . . . whether the state court actually decided an issue of fact or law that was necessary to its judgment." *Id.* at 342.

Respondent ought to have faced a similar bar in his effort to get the federal courts to give him a more favorable ruling than the Alaska courts. The state trial and appeals courts devoted much time and effort to determining his DNA entitlement, ultimately deciding that he had failed to make the requisite evidentiary showing. Having litigated his DNA claim up and down the Alaska court system and then back up, respondent should not be permitted to do so again in federal court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL.,

Petitioner,

v.

WILLIAM G. OSBORNE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CURRENT AND FORMER PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

"[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). The obligations and constraints that animate this principle are uniquely those of the prosecutor, who "by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986) (Marshall, J., dissenting from the denial of certiorari). He or she "may prosecute with earnestness and vigor," but always with the "twofold aim . . . that guilt shall not escape nor innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). This Court has "several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'" *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999) and citing cases). *See generally Brady v. Maryland*, 373 U.S. 83 (1963).

Amici listed here are current and former prosecutors representing nearly a century of prosecutorial experience at the local, state and federal level. They have prosecuted murder cases, rape cases, and other crimes where deoxyribonucleic acid ("DNA") evidence is often relevant. All of them have proceeded with prosecutions based on direct and

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

circumstantial evidence that was highly indicative of guilt, but where such guilt could not be known with total certainty. Some of them have had the experience of obtaining the conviction of an individual who was later proven innocent by postconviction DNA testing, or have participated in the release of evidence to a convicted person who would later establish proof of their innocence and vacatur of their sentence. To be sure, such an experience is humbling. Many of these convicted individuals faced overwhelming evidence against them. Often times they were positively identified by multiple eyewitnesses, and a number even confessed to the crime. But with advances in science now allowing an individual to be absolutely exonerated or identified as the true perpetrator with an extremely high rate of accuracy, circumstantial and testimonial evidence are, in some cases, no longer the best indicia of guilt we have.

"[T]radition and experience justify [the] belief that the great majority of prosecutors [are] faithful to their duty" to seek the truth. *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987). However, experience also demonstrates that "institutional and political barriers" may "deter district attorneys' offices from recognizing potentially valid innocence claims." Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance to Postconviction Claims of Innocence*, 84 B. U. L. REV. 125, 130 (2004). And state laws, while commonly available, often exclude large classes of cases from postconviction DNA testing based on arbitrary factors that bear no

relation to the likely result of the test. *Amici* believe that postconviction DNA testing should be available, as a matter of federal law, when an exclusionary result would demonstrate that it is more likely than not that the convicted person did not commit the crime, and state law fails to provide the adequate recourse.

Amicus Janet Reno was the Attorney General of the United States from 1993 to 2001. As Attorney General during a time when the technology of DNA testing was rapidly advancing, she directed the National Institute of Justice (NIJ) to identify the prevalence of convictions that were later overturned by modern science. After extensive study, the NIJ published a report entitled *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996). Upon reviewing this report, the Attorney General established and convened the National Commission on the Future of DNA Evidence in 1998. The Commission consisted of representatives from prosecution, the defense bar, law enforcement, the scientific community, the medical examiner community, academia, and victims' rights organizations, and served the important role of providing the Attorney General with recommendations on the use of current and future DNA methods, applications and technologies, from the crime scene to the courtroom. Her leadership at the national level led to the preparation of a number of Commission reports, including *Postconviction DNA Testing: Recommendations for Handling Requests*

(2000), which proved extremely influential in giving guidelines for individual prosecutors and transforming the state statutory landscape over this past decade. (*See infra.* pp. 13-14.) Prior to serving as Attorney General of the United States, she was the State Attorney of Dade County in Florida from 1978-1993. She is also a member of the Board of Directors for the Innocence Project, Inc., counsel for respondent.

Amicus Thomas M. Breen was an Assistant State's Attorney in Cook County, Illinois, from 1972 to 1978, during which time he led the prosecution and secured the convictions of Chicago teenagers Michael Evans and Paul Terry for the 1976 rape and murder of a nine-year-old Chicago girl. Nearly a quarter of a century later—in what a Chicago Tribune editorial called "an act of profound self-reflection and courage"—Breen confided to an attorney at the Center on Wrongful Convictions that he had begun to harbor serious doubts about the youths' guilt. Center lawyers obtained DNA testing, which exonerated Evans and Terry in 2003. Breen's misgivings about the case surfaced as a result of his experience in private practice (which he entered in 1981) representing wrongfully convicted defendants such as Gary Dotson, the victim of a fabricated rape allegation who in 1989 became one of the first persons in the world to be exonerated by DNA, and Rolando Cruz, who was exonerated in 1995 by DNA testing of the 1983 abduction, rape, and murder of a little girl.

Amicus Kenneth L. Gillis served in high-level supervisory positions in the Cook County, Illinois, State's Attorney's Office for 12 years, serving as Chief of Special Prosecutions during the 1970s and as First Assistant State's Attorney from early 1991 through late 1992. He was instrumental in the State's Attorney's decision to consent to DNA testing (not yet required by statute) in the case of Steven Paul Linscott, who had been convicted of murder based on his description to police of a dream that prosecutors had construed as a confession. In July of 1992, Linscott became the second wrongfully convicted person (after Gary Dotson) to be exonerated by DNA in Illinois.

Amicus Peggy A. Lautenschlager served as Attorney General for the State of Wisconsin from 2002 to 2006. During her time as Wisconsin Attorney General, Ms. Lautenschlager made efforts to improve the efficiency of the state crime laboratory with an eye toward facilitating requests by prosecutors and defense attorneys alike to seek DNA testing of biological evidence. Prior to her service as state Attorney General, Ms. Lautenschlager was the District Attorney for Winnebago County, Wisconsin, from 1985 to 1988 and United States Attorney for the Western District of Wisconsin from 1993 to 2001.

Amicus Carl J. Marlinga was the elected prosecuting attorney of Macomb County, Michigan (in suburban Detroit), from 1984 to 2004. In that position, Mr. Marlinga directed hundreds of prosecutions which identified perpetrators through

DNA evidence. Mr. Marlinga also became personally involved with the exoneration of Kenneth Wyniemko, who had been convicted in the Macomb County Circuit Court in 1994 of criminal sexual conduct. The circumstantial evidence against Mr. Wyniemko at trial was overwhelming, but when technology advanced to the point where trace biological evidence could be tested, Mr. Marlinga consented to the release of that evidence for testing. After serving nine years of a 40-60 year sentence, the new tests excluded Mr. Wyniemko as a source of the DNA. As is often the case (*see infra.* pp. 17-18), the DNA testing helped identify the true perpetrator of the crime. However, by that time, he could not be prosecuted because of the statute of limitations.

Amicus Scott D. McNamara was elected to serve as District Attorney of Oneida County, New York in November of 2007, after having been appointed to that position in March of that same year. In August of 2007, he consented to DNA testing requested by the Innocence Project in the case of Steven Barnes, who was convicted in 1989 of the rape and murder of sixteen-year-old Kimberly Simon. Those tests excluded Mr. Barnes as the source of foreign DNA found on the rape kit and the clothing worn by the victim at the time of the crime. In November of 2008, pursuant to a joint motion made by Mr. McNamara's office and the Innocence Project, Mr. Barnes was released after serving over 20 years of a life sentence.

Amicus Jim Petro was elected Attorney General of Ohio in 2002, retiring from that position in January

2007. During his service as Attorney General, Mr. Petro was actively involved in the development and adoption of Ohio's first post-conviction DNA statute, effective October 29, 2003; and the subsequent current post-conviction DNA statute, effective July 11, 2006. He also sought and received legislative authority mandating the taking of DNA samples from all convicted felons and serious misdemeanants, resulting in the development of nearly one-quarter million criminal DNA profiles in the state's data files, and the solving of hundreds of criminal cases through DNA matching technology. For his efforts in advancing the use of DNA technology, the Ohio Association of Chiefs of Police presented Petro with its "Visionary Leadership" and "Legacy" awards in 2005 and 2006. Petro was the first attorney general in the nation to intervene on behalf of a defendant seeking exoneration, in the case of Clarence Elkins. Post-conviction DNA testing ultimately proved Mr. Elkins' innocence, identified the actual perpetrator and brought about his conviction.

Amicus Craig Watkins was elected District Attorney for Dallas County, Texas in 2006, five years after the Texas legislature codified a limited right to postconviction DNA testing. In the intervening time, seven men in Dallas County were exonerated of rape or sexual assault, despite the consistent opposition of Watkins' predecessor to postconviction DNA testing. Shortly after assuming office, Watkins established the Conviction Integrity Unit, a comprehensive voluntary review of Dallas County cases dating as far back as 1970. In instances where DNA analysis

could prove exculpatory, Dallas County now makes the evidence available. In the two years since Watkins took office, postconviction testing has exonerated nine more individuals (including Patrick Waller, whose case is detailed below (*infra* pp. 17-18)). These nine individuals collectively served almost two centuries in prison for crimes they did not commit. In June 2008, Dallas County granted Watkins an additional $450,000 to continue his voluntary review program.

Amicus Andrea L. Zopp was an assistant United States Attorney for the Northern District of Illinois from 1983 through 1990, Chief of the Narcotics Bureau of the Cook County State's Attorney's Office from 1991 until late 1992, and First Assistant State's Attorney of Cook County from 1992 until late 1996. As First Assistant, she authorized felony prosecutors to voluntarily agree to DNA testing in a 1978 rape and double murder case that the news media called the Ford Heights Four case (a misnomer, because there were five defendants in the case, four men and a young woman whose confession had been instrumental in all of the convictions). The DNA testing exonerated all five defendants, two of whom had been sentenced to death. The testing corroborated confessions of other three men, who subsequently were convicted of the crime.

Because the Court's decision in this case will have a profound effect on how other prosecutors approach the retention, release and testing of DNA evidence, *amici* have a special interest in participating in this

debate. They are the people who have fulfilled the mandate of their respective state postconviction laws; who have witnessed first-hand their promise and their limitations; and who would likewise see the practical effect of the limited federal right that the respondent is urging here. And due to *amici*'s personal experiences with postconviction DNA testing, they are uniquely situated to assure this Court that a limited federal right is both absolutely necessary and absolutely proper to advance both the fairness and the finality of state criminal convictions through the promise of modern science.

SUMMARY OF ARGUMENT

I. The search for truth is a foundational core of our criminal justice system, and modern DNA analysis now allows us, in some cases, to find the truth to an extremely high degree of accuracy. Its promise has encouraged many local district attorneys' offices to voluntarily review cases where DNA results could change the verdict, a development which has garnered the federal government's full support. The majority of individual prosecutors in other jurisdictions have followed this lead. However, relying solely on the unfettered discretion of prosecutors to unlock the promise of DNA analysis can sanction injustice. *Amici* have personally seen meritorious cases evade postconviction testing for too long due to rigid opposition from state and local authorities. According to a recent study, one-fifth of the 232 postconviction DNA exonerations nationwide occurred not *because of* the good conscience of

prosecutors, but *despite* their best efforts to oppose the test. Justice delayed is justice denied.

And justice for the wrongly-convicted is not the only goal of a liberal policy toward postconviction DNA testing. Due to increased collaboration with federal, state and local authorities in maintaining DNA databanks, a high percentage of those exonerations also lead to a positive identification of the actual perpetrator, imparting a sense of *real* justice for the victim and increasing the integrity and public trust in our criminal justice system. Indeed, with present costs of DNA analysis around one-thousand dollars, it is a wasteful use of precious resources to litigate opposition to DNA testing rather than simply to allow it. *Both* an exculpatory result or an inculpatory result will shut-off future claims of actual innocence.

II. Over the past decade, forty-four states and the District of Columbia have enacted postconviction DNA testing laws. These laws serve the salutary purpose of authorizing DNA analysis when an exculpatory result would likely impugn the verdict of conviction. But this aim is not uniformly fulfilled. Some states—like Alaska—have no mechanism at all to allow for DNA testing, even in the most meritorious cases. Others exclude broad classes of cases from relief based on arbitrary, legislative judgments that experience shows bear no relation to the likely result of the testing. Indeed, Petitioner's *amici* argue that the respondent here, who the State of Alaska now concedes would be absolutely

exonerated with an exculpatory test, would be statutorily ineligible for postconviction DNA testing in several states. This simple fact—and the sheer volume of other, meritorious cases that these laws would exclude from their scope—demonstrates that the present state response to these technological developments does not adequately fulfill the promise of forensic DNA testing.

This is precisely why a limited federal right is needed. In cases where the state procedures fail to provide a "means of redress [that] satisf[ies] the requirement of procedural due process," a federal cause of action under 42 U.S.C. § 1983 will lie. *Parratt v. Taylor*, 451 U.S. 527, 537 (1981). However, where there is an "adequate state remedy" for postconviction DNA testing, *id.* at 542, there is simply no constitutional deprivation for federal law to redress. A federal constitutional right that requires a higher showing than most state statutes—something akin to "no reasonable juror would have found the defendant guilty" if favorable DNA test had been introduced at trial, *see Schlup*, 513 U.S. at 329—would leave the state laws in place as the likely avenue of first resort for postconviction DNA testing. Such a scheme is a necessary, yet still subsidiary, extension of federal due process.

This limited federal right will not significantly affect state or federal resources. Most postconviction claims for DNA testing accompany other claims, like ineffective assistance of counsel, which will not dissipate in the absence of a federal right to DNA

testing. And recent experience suggests that litigious claims for DNA testing are actually decreasing. Due to advances in DNA technology and the subsequent decrease in the cost of such testing, most criminal cases where DNA evidence is at issue will include pre-trial DNA testing, obviating any need for postconviction action. And, even where testing is not conducted pre-trial, many prosecutors—like *amici*—are consenting to postconviction DNA testing without litigation. Experience illustrates these trends. The first federal court to allow a § 1983 action for postconviction DNA testing was in 2001, and since then, there have been only *two more* cases in that circuit seeking the same relief. Minimal burdens of this sort deserve little or no weight in resolving the question before the Court.

ARGUMENT

I. Postconviction DNA Testing To Confirm Or Disprove Identity Advances The Government's Interest

In the last 15 years, DNA evidence has greatly enhanced the efficacy of truth-finding in criminal adjudications. It is, indeed, "the foremost forensic technique for identifying perpetrators." U.S. Dep't of Justice, Nat'l Inst. Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 1 (2000). DNA testing can be "at least five times as likely to result in a suspect identification compared with fingerprints." Urban Inst. Justice Policy Ctr., *The DNA Field Experiment: Cost-Effectiveness*

Analysis of the Use of DNA in the Investigation of High-Volume Crimes 3 (2008). The results neither "become weaker over time in the manner of testimonial proof," *id.* at 9, nor are they vulnerable to the subjectivities of recantation. *See Davis v. Georgia*, 660 S.E.2d 354 (Ga.), cert. denied, 129 S. Ct. 397 (2008).

These realizations inevitably led to an early embrace of the technology and its truth-seeking possibilities. For instance, even before the state of California enacted a statute permitting postconviction access to DNA evidence, district attorneys there began voluntary reviews "for cases where DNA tests had not been performed originally and where it could change a verdict." *See* James Sterngold, "San Diego District Attorney Offering Free DNA Testing," N. Y. TIMES, July 28, 2000, at A12. The sense of justice associated with his office also compelled *amicus* Craig Watkins to institute a similar program in Dallas, Texas, years *after* the state legislature enacted a statutory right to postconviction testing. *See* Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas*, WASH. POST, March 5, 2007.

The Department of Justice endorses such postconviction, discretionary relief mechanisms. This endorsement began under the leadership of Attorney General Janet Reno, who is also an *amicus* here. (*See supra.* pp. 3-4.) In 1998, she created the National Commission on the Future of DNA Evidence to make recommendations for addressing requests for

postconviction DNA analysis. Her leadership led to the preparation of a number of Commission reports, including *Postconviction DNA Testing: Recommendations for Handling Requests* (2000), which proved extremely influential in giving guidelines for individual prosecutors facing postconviction DNA testing requests and state legislatures contemplating postconviction statutes. The Commission assessed how prosecutors should respond to such requests in five different types of scenarios. In the first category, where the state concedes that DNA evidence is available for testing and could prove exculpatory, the Commission concluded that prosecutors "should be willing to stipulate to the testing and to agree that testing will be paid for by the State if the inmate is exonerated." *Id.* at 35.

In further recognition of the unique power of modern DNA analysis, former President George W. Bush committed over a billion dollars to promote the use of DNA technology to "identify criminals . . . clear suspects and exonerate persons mistakenly accused or convicted of crimes." *The President's Initiative to Advance Justice Through DNA Technology, available at* http://www.usdoj.gov/ag/dnaoverviewinitiative21.htm. The Prosecutor's Practice Notebook, issued as part of the President's DNA initiative, encourages those in the position of *amici* to "proactively examine potentially problematic cases" to either "confirm[] the original conviction or . . . exonerate[e] the earlier conviction." Such policies "enhance public trust in the integrity of the legal system." THE PROSECUTOR'S

PRACTICE NOTEBOOK. With these guidelines and accompanying financial support, and in acknowledgment of the fundamental values at stake, local district attorneys are more frequently undertaking voluntary programs of review and testing. *See* Fred. C. Zacharias, *The Role of Prosecutors in Serving Justice After Conviction*, 58 VAND. L. REV. 171, 198-200 (2005) (describing programs in Brooklyn, N.Y., Oklahoma County, Okla., Suffolk County, N.Y., Ramsey County, Minn., and Orange County, Cal.).

While discretionary reviews have proven invaluable, *amici* believe that placing access to DNA evidence in the unchecked hands of prosecutors will not infrequently sanction injustice. Had it been left to the sole discretion of prosecutors, Robert Clark would still be serving his life sentence for the 1981 abduction and rape of a woman in Atlanta, Georgia. Clark spent twenty-three years behind bars, petitioning for almost a decade to test the biological evidence of the crime. Each attempt met with opposition from prosecutors, and after a court ordered testing under Georgia's new postconviction DNA testing statute, the state successfully opposed the choice of laboratory. When the test was finally performed in 2005, the testing not only exonerated Clark, but identified the actual perpetrator, who had committed still more violent crimes during Clark's imprisonment. *See* "DNA That Freed One Links Another To Cobb Rape," ATLANTA-JOURNAL CONSTITUTION, Feb. 16, 2007. This is not a unique story; according to a recent study, one-fifth of the

232 [2] postconviction DNA exonerations to date occurred not *because of* the good conscience of prosecutors, but *despite* their best efforts to oppose the test. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 119 (2008) & Brandon L. Garrett, *Judging Innocence: An Update*, *available at* tinyurl.com/garrett2009. Petitioner here, the State of Alaska, provides a case on point: research has not identified a *single instance* where state prosecutors have consented to postconviction DNA analysis.

To be sure, the principle of finality is no doubt "essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Rigid opposition to postconviction remedies, however, is not the only route to achieve finality. In no less than 94 cases—over a third of all exonerations—DNA testing not only released an innocent man from prison, but also identified the actual offender. *See* Innocence Project Website, http://www.innocenceproject.org/know/Search-Profiles.php. Such promising results are made possible by the Combined DNA Index System ("CODIS"), which aggregates local, state and federal databanks that house millions of DNA profiles, and allows investigators to compare crime-scene evidence with possible matches. But delays in permitting

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[2] Respondent's brief in this case states that there have been 227 exonerations to date, but since that brief was filed last week, five more individuals have been exonerated in Nebraska because of DNA evidence. *See* "Five Pardoned After Wrongful Conviction in Neb. Crime," ASSOCIATED PRESS, Jan. 26, 2009.

these comparisons obstruct the *accurate* finality that *amici* and other prosecutors seek to provide. Patrick Waller, for instance, spent more than fifteen years in prison for a 1992 kidnapping and robbery that included sexual assaults. Repeated requests for postconviction DNA testing of the crime-scene evidence were denied by the district attorney. Waller spent almost seven years litigating that request under Texas' DNA statute, which was ultimately denied because eyewitnesses had "unequivocally identified" him. *Waller v. Texas*, Nos. 05-02-00118-R, 2003 WL 22456324 (Tex. Ct. App., Oct. 30, 2003). Only after *amicus* Craig Watkins was elected to that office were the tests finally performed. DNA testing exonerated Waller in 2008, and state authorities ran the test results through CODIS and identified two individuals who subsequently confessed to the crimes. But because the statute of limitations on the crimes had run during Waller's prison term, the true assailants could not be prosecuted. *See* Jennifer Emily, "Patrick Waller, exonerated by DNA, grants first interview," DALLAS MORNING, June 30, 2008.[3] As this case illustrates, opposition to postconviction

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[3] Not only did the statute of limitations run during Waller's imprisonment, but the delay caused by the years during which the prior District Attorney opposed testing allowed the real perpetrators to be released on parole for other offenses. If the State of Texas had the DNA results earlier, though, it could have used those results to deny parole and keep those individuals off the streets.

DNA testing can needlessly prolong the search for truth and finality.[4]

Such opposition also diverts valuable resources. As the National Institute for Justice has noted, "litigating postconviction DNA applications often will be unnecessarily complex, expensive, and time consuming" in the absence of prosecutorial cooperation. Nat'l Inst. Justice, *Postconviction DNA Testing*, *supra* at 10. Brandon Moon was convicted in 1988 on three counts of aggravated sexual assault and began serving a seventy-five year sentence. For the next fifteen years, Moon filed numerous post-trial motions, petitions, and requests for analysis of DNA evidence taken from the crime scene. The state dedicated unknown quantities of time and money opposing Moon's efforts to exonerate himself. After Texas enacted a postconviction testing statute, the court granted one of Moon's motions, and he was fully

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[4] Waller's case is not an isolated one. *Amicus* Carl Marlinga helped exonerate Kenneth Wyniemko through DNA testing, which also identified the true perpetrator of the crime. However, due to early opposition to such testing, further prosecution was barred by the statute of limitations. (*See supra* pp. 5-6.) The statute of limitations for a 1993 sexual assault also expired during the fourteen years that Ronald Gene Taylor of Houston, Texas spent in prison after being convicted of aggravated sexual assault. After DNA testing exonerated Taylor in 2007, the true perpetrator was identified through a DNA database, but could not be brought to justice for the crime. *See also* Jennifer Emily and Scott McGonigle, "Delay of DNA Evidence Helped Guilty Go Free," DALLAS NEWS, June 27, 2008 (noting at least three instances were a person inculpated by DNA testing died before the testing).

exonerated of the crimes in 2005. *See generally* Maurice Possley, "Texas Man Exonerated in Rape Case," CHICAGO TRIBUNE, Dec. 21, 2004. While the effort spent defending Moon's conviction was ultimately misguided, it was also severely inefficient. The average cost of forensic DNA analysis in an accredited lab is now about one-thousand dollars, and both inculpatory and exculpatory test results can significantly curtail an inmate's legal claims of actual innocence. [5] Given the burden of protracted postconviction lawsuits, timely DNA analysis is a more prudent allocation of prosecutorial resources.

"'[T]he Government wins its point when justice is done in its courts.'" *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (quoting Hon. Simon E. Sobeloff). Since 1989, DNA analysis has exonerated 232 individuals—seventeen of whom spent time on death row—and has proven a crucial safeguard for the constitutional values of our criminal justice system. In the same time, DNA has given new meaning to the "beyond a reasonable doubt standard," and has established the culpability of countless other defendants more certainly than any other legal mechanism. *Amici* believe that the government's interest in the consistent availability of this unique evidence is beyond question.

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[5] *See* Nicholas Lovrich, Ph.D., *et al.*, *National Forensic DNA Study Report*, *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/203970.pdf (surveying state and local laboratories to arrive at an approximate cost of $1,100 for a basic rape case).

II. A Limited Federal Right for Postconviction Access to DNA Evidence Would Pose A Minimal Burden On State Laws And Procedures

A. Such A Right Would Not Affect the State Statutory Mechanisms Currently In Place

Over the course of the past decade, nearly every state has enacted a postconviction DNA testing statute. These laws uniformly acknowledge that postconviction DNA testing provides a unique "opportunity to generate accurate and objective identification evidence and enhance the integrity of the criminal justice system." Br. of Thirty-One States as *Amicus Curiae* Supporting Pet'r, at 4. Drawing on the leadership of Attorney General Janet Reno and the work of the National Institute of Justice, these laws generally agree that DNA evidence in the State's possession should be tested where "exclusionary results would exonerate the Petitioner." Nat'l Inst. Justice, *Postconviction DNA Testing*, *supra*, at 4.

This is such a case. Respondent was convicted on one count of rape. He was accused of having vaginal intercourse with the victim and leaving behind a used condom. He pressed a defense of mistaken identity at his trial. DNA testing of the crime-scene evidence could establish with *absolute certainty* whether respondent did in fact leave behind the evidence, and was truly the perpetrator of the rape. An exclusionary result, for sure, would absolutely exonerate the respondent, and could identify the true

perpetrator of the crime. The State of Alaska concedes so much. Petr's Reply to Br. in Opp'n, at 8-9 (conceding that the DNA test that Osborne seeks could "conclusively establish Osborne's innocence.")

But Alaska is one of six states that have *not* enacted statutory postconviction DNA testing procedures. And many of the states that *have* enacted such laws have peppered them with so-called "statutory filters" that purport to "ensure that testing will occur in truly meritorious cases but not in the many others where DNA testing would be a pointless and wasteful exercise." Br. of Thirty-One States as *Amicus Curiae* Supporting Pet'r, at 5. For sure, not every case should qualify for postconviction DNA testing. However, the United States acknowledges that respondent here would be denied DNA testing in some states because he is "not under a sentence of death"; because he "forewent . . . DNA testing at trial"; and because he "later confessed to the crime." Br. of the United States as *Amicus Curiae* Supporting Pet'r, at 23. The experience of *amici*, however, is that such arbitrary line-drawing tends to exclude "truly meritorious cases" from DNA testing. This is precisely why a limited federal right to postconviction DNA testing is necessary.

For instance, Kentucky and Nevada exclude non-capital cases from any entitlement to postconviction DNA testing. *See* KY. REV. STAT. ANN. § 422.285; NEV. REV. STAT. ANN. § 176.0918. Not only would these statutes exclude the respondent, but they likewise would have excluded at least *220 of the 232*

individuals who have been exonerated nationwide by DNA testing. Those individuals would still be behind-bars in the states who view DNA testing for non-capital convictions a "pointless and wasteful exercise."

At least four other states restrict postconviction DNA testing to situations where testing was not technologically feasible at the time of trial. *See* MINN. STAT. § 590.01(1a); MO. REV. STAT. § 547.035; 42 PA. CONS. STAT. ANN. § 9543.1; VA. CODE ANN. § 19.2-327.1. These statutes thus exclude persons from any entitlement to DNA testing if their trial counsel simply failed to request it. However, at least 55 out of over 200 exonerees had some form of DNA testing available to them at trial, and 25% of those cases involved situations where trial counsel simply failed to request the testing. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1657, 1663 (2008). Brian Piszczek, for example, was convicted of rape in Ohio, based largely on the victim's testimony "that there was no doubt in her mind that [he] was the person who raped her." *See Ohio v. Piszczek*, No. 62203, 1993 WL 106966, at *3 (Ct. App. Apr. 8, 1993). His trial counsel never requested DNA testing, even though it was available at the time of his conviction. *Id.* In postconviction proceedings, the physical evidence from the rape was released to Piszczek and tested, and excluded him as the source. He was released after four-years of wrongful incarceration, but had Brian Piszczek been convicted in either Minnesota, Missouri,

Pennsylvania or Virginia, he would likely still be in prison today.

At least one state conditions postconviction DNA testing on the petitioner's ability to demonstrate—*before the test is carried out*—that it will likely lead to an exculpatory result. *See* N.Y. CRIM. PROC. L. § 440.30(1-a). The United States asserts that respondent here should be forced to meet this same onerous burden. *See* Br. of United States as *Amicus Curiae* Supporting Pet'r, at 23-24. But if experience has taught us anything, it has taught us that neither the intuition of prosecutors, the deliberation of juries nor the wisdom of judges can usurp the accuracy and reliability of a DNA test. In *Arizona v. Youngblood*, 488 U.S. 51 (1988)—the first DNA case to come before this Court—the evidence against the accused appeared "so overwhelming that it was highly improbable that the lost [DNA] evidence was exculpatory." *Id.* at 59-60 (Stevens, J., concurring) (noting that "it is unlikely that the defendant was prejudiced by" the failure of the State to preserve and test the DNA evidence.) But nearly a decade later, when technology advanced to point where the miniscule samples retained by police could be reliably tested, Larry Youngblood was exonerated.

Even when state laws do not contain arbitrary preconditions for postconviction DNA testing, state courts have still implied them. While many state statutes require identity to have been in issue at an individual's trial in order to justify postconviction DNA testing, some state courts have read this

requirement to disqualify a person if their conviction was based on a guilty plea. *See* Garrett, *Claiming Innocence*, *supra*, 92 MINN. L. REV. at 1680-81 & n.238. At least one state court has interpreted its law to exclude individuals from postconviction DNA testing if their conviction was based on a confession.

Bruce Godschalk—presently the *only* individual exonerated via § 1983—is one of 31 DNA exoneration cases that involved a prior confession by the accused. *See* Garrett, *Judging Innocence*, *supra*, 108 COLUM. L. REV. 55, 88-89 & n.124 (2008). He was originally charged and convicted of two rapes in the courts of Pennsylvania. His conviction was based on what the court deemed to be "overwhelming evidence," largely due to a detailed confession that it found to be both voluntary and uncoerced. *See Godschalk v. Montgomery County Dist. Atty's Office*, 177 F. Supp. 2d 366, 367, 369 (E.D. Pa. 2001). Fifteen years later, after a federal court upheld his § 1983 suit to access and test the DNA evidence taken from the victims, *see id.* at 370, Bruce Godschalk was exonerated of the crimes. The Pennsylvania legislature passed its postconviction DNA testing statute four months later—no doubt with Godschalk's case in mind—but it is doubtful whether that statute would have granted him any relief. Pennsylvania courts have to date interpreted its provisions to bar postconviction access to DNA evidence if the petitioner had previously confessed to the crime of conviction. *See Pennsylvania v. Young*, 873 A.2d 720, 727 (Pa. Super. Ct. 2005) (holding that, under the 2002 Pennsylvania law for postconviction DNA access, a "confession . . .

bars [an inmate] from asserting a claim of actual innocence for the offense for which he was convicted," which thereby bars his statutory entitlement to access to evidence for DNA testing under Pennsylvania law). Without a *federal* remedy, Bruce Godschalk would likely have served his full sentence.[6]

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[6] The infamous Central Park Jogger cases provides a second dramatic example of how false confessions lead to wrongful convictions. After a white female jogger was brutally attacked in Manhattan's Central Park in 1989, prosecutors brought charges against five African- and Hispanic-American youths who all confessed to police. *See* Saul M. Kassin & Gisli H. Gudjonsson, *True Crimes, False Confessions*, SCIENTIFIC AM. MIND, June 2005, at 24. Four of these confessions were videotaped and later presented at trial. *Id.* The confessions were admitted and defendants were all convicted. The propriety of the confessions was duly litigated and ultimately upheld by the New York courts. *See, e.g.*, *People v. Salaam*, 83 N.Y.2d 51, 607 N.Y.S.2d 899 (1993); *People v. McCray*, 198 A.D.2d 200, 604 N.Y.S.2d 93 (1993). Thirteen years after the crime, an individual named Matias Reyes, who was incarcerated for three other rapes and a murder, came forward and admitted that he had committed the heinous crime alone. *See People v. Wise*, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002). The Manhattan DA's office questioned Reyes and discovered that he had accurate, privileged, and independently corroborated knowledge or the crime and crime scene. *Id.* When the DNA evidence of the crime was finally tested, it showed that Reyes, and not to any of the convicted youths, had committed the crime. *Id.* In December 2002—after a full decade of wrongful imprisonment—the convictions were vacated and the youths released. *Id.* Although New York had the first postconviction DNA testing statute, only the conscience of the real assailant combined with the proof of DNA testing cured the injustice.

The "statutory filters" enacted by the states plainly do not ensure that all meritorious cases are submitted for testing. Instead, they contain arbitrary, legislative judgments on the likely outcome of DNA testing—which experience has demonstrated to be routinely flawed. While "legislative innovation" should indeed be encouraged in the field, *see* Br. of Thirty-One States as *Amicus Curiae* supporting Pet'r at 20-21, such innovation cannot take the form of prejudging the outcome of scientific testing before it is carried out. There is no principled basis to definitively conclude that those convicted of non-capital crimes, those represented by ineffective counsel, or those who falsely confess are absolutely guilty in the face of so much empirical and anecdotal evidence to the contrary. Allowing DNA testing in these cases is not, as the Petitioner's *amici* claim, a "pointless and wasteful exercise." Br. of Thirty-One States as *Amicus Curiae* Supporting Pet'r, at 5.

A limited federal right to postconviction DNA testing would not direct the states on how to manage their postconviction processes. The purpose of § 1983 is to "provide[] a remedy where state law [i]s inadequate . . . [or] not available in practice." *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961). The vast majority of state laws on postconviction DNA testing (40 out of 44) require a petitioner to show only a "reasonable probability" that a favorable result would have led to a different result at trial. *See* Garrett, *Claiming Innocence*, *supra*, 92 MINN. L. REV. at 1719; *see also* 18 U.S.C. § 3600(a)(1), (6)-(8). A federal constitutional right that requires a higher showing—

something akin to "no reasonable juror would have found the defendant guilty" if favorable DNA test had been introduced at trial, *see Schlup*, 513 U.S. at 329—would leave these statutes in place as the likely avenue of first resort for postconviction relief.[7] The States, in their brief to this Court as *amici curiae*, seem to endorse this rule as well. *See* Br. of Thirty-One States as *Amici Curiae* Supporting Pet'r, at 18-19 (advocating that "the Constitution should require access to potential evidence of actual innocence only to the same degree that it requires states to provide an avenue to process claims of actual innocence.")

This places the constitutional right in its proper, subsidiary role. "The Fourteenth Amendment protects only against deprivations 'without due process of law.'" *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (quoting *Baker v. McCollan*, 443 U.S. 137, 145 (1979)). Thus, the inquiry in every federal action for postconviction DNA testing would naturally focus on whether the individual has suffered an injury *without due process of law*—that is, whether the State has failed to provide "a means of redress [that] satisf[ies] the requirements of procedural due process." *Id.* In all cases, "the existence of an

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[7] Of the four states to impose a higher standard to justify postconviction DNA testing, two of those states match the "no reasonable juror" standard, *see* TEX. CODE CRIM. PROC. ANN. arts. 17.48, 64.01-.05 and COLO. REV. STAT. §§ 18-1-411 to 416, and only two states impose a more onerous "clear and convincing" standard. *See* N.H. REV. STAT. ANN. § 651-D:2 and VA. ANN. CODE §§ 19.2-327.1 to .6.

adequate state remedy . . . avoids the conclusion that there has been any constitutional deprivation . . . within the meaning of the Fourteenth Amendment." *Id.* at 542 (internal quotations marks omitted). A federal cause of action under § 1983 will lie *only* in those cases where the State provides no remedy at all, or where it excludes the application of its statutory remedy to otherwise worthy petitioners based on arbitrary classifications.[8]

It is a prosecutor's duty "to use every legitimate means to bring about a just [result]." *Berger v. United States*, 295 U.S. 78, 88 (1935). Our criminal

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[8] This is hardly a novel proposition, even in the field of criminal law and procedure. Prior to 1963, for instance, the mechanism for indigent defendants to receive appointed counsel lay solely with state law. While "most of the states ha[d] by legislation authorized or even required the courts to assign counsel for the defense of indigent and unrepresented prisoners," such laws were "neither universal nor uniform." *Bute v. Illinois*, 333 U.S. 640, 663-64 (1948) (internal quotations marks omitted). Efforts to impose a minimum federal standard for the right to counsel in state courts routinely met the same refrain: "in the face of these widely varying state procedures," this Court refused to impose the dictates of "due process" onto the states and "hold invalid all procedure not reaching that standard." *Id.* at 668; *see also Betts v. Brady*, 316 U.S. 455, 470-72 (1942). But this Court unanimously shifted course in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and held that the due process clause guarantees a minimum degree of "procedural and substantive safeguards" in state criminal courts. States were thereafter constitutionally required to provide indigent defendants with appointed counsel in certain cases, and left free to legislate above that minimum threshold. With appointed counsel and a new trial, Mr. Gideon was acquitted.

justice system requires a certain degree of flexibility and humility to correct errors, especially when those errors are readily ascertainable by modern science. *Amici* submit that the wrongful convictions that local prosecutors and state laws would have overlooked—and perhaps have overlooked—provides a weighty justification for the recognition of a limited federal right for postconviction DNA testing.

B. A Limited Federal Right Would Not Overwhelm State and Federal Resources.

Amici are current and former law enforcement officers in jurisdictions that rely on locally-funded budgets to prosecute hundreds or thousands of criminal cases each year. The defense of convictions from collateral attack is a familiar demand on scarce resources. In the experience of *amici*, however, no significant increase in that demand is uniquely attributable to the availability of postconviction DNA testing, and the limited federal right proposed above (*see supra.* § II.A.), will not significantly affect state or federal dockets. Most commonly, civil actions and collateral attacks to invalidate a conviction seek forensic DNA analysis as one of several bases for relief, along with, for instance, ineffectiveness of counsel or prosecutorial misconduct. Thus, cases that seek postconviction DNA testing would likely arise even *without* a due process right to such testing.

Recent experience also suggests that the necessity for judicial resolution of claims for

postconviction DNA testing is actually decreasing. There are two reasons behind this trend. *First*, improvements in the reliability of forensic methodologies encourage more frequent *pre-trial* DNA analysis. Of the 232 DNA exonerations to date, half of these individuals were convicted between 1982 and 1987, when the science of DNA testing was more expensive and less conclusive. Following the advent of more precise methodologies in the mid-1990s, DNA evidence has exonerated only twelve individuals who were convicted in the last ten years. The initial wave of DNA exonerations has focused principally on older convictions; most new convictions are *supported* by DNA evidence.

Second, in cases where DNA evidence was not analyzed before trial, prosecutors are becoming more willing to make the evidence available after conviction. Each DNA exoneration represents a cautionary tale for prosecutors everywhere, and the publicity associated with these cases helps legitimize other claims for postconviction access. *Amici* here offer firsthand testimony regarding the wisdom of programs such as the Conviction Integrity Unit in Dallas County, Texas, which voluntarily reviews cases where DNA evidence could conclusively establish guilt or innocence. Following the recommendations that the Department of Justice promulgated in 2000, this and similar programs forego the adversarial process in favor of a collaborative effort to fully utilize the benefits of scientific testing. In this vein, the existence of a

constitutional right may actually help *decrease* litigation for postconviction access to DNA evidence.

Experience illustrates these trends. A federal court in Pennsylvania first permitted the use of 42 U.S.C. § 1983 to enforce a due process right for postconviction DNA testing in 2001. *See Godschalk*, 177 F. Supp. 2d 366. Four months later, Pennsylvania enacted a statute that also permitted postconviction DNA analysis in certain circumstances. (*See supra* pp. 24-25.) Since that time, only *two* courts in the Third Circuit have addressed § 1983 claims for postconviction DNA analysis. *See Ross v. Lehigh County Dist. Atty's Office*, No. 07-2329, 2008 WL 5234411 (E.D. Pa. Dec. 15, 2008); *Grier v. Klem*, No. 05-05, 2006 WL 1835805 (W.D. Pa. June 29, 2006). Two cases in over seven years hardly represents an alarming diversion of judicial resources.[9]

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[9] Petitioner's *Amici* refer to the number of cases reviewed by the California Innocence Project as indicative of the "onerous litigation" that would follow a federal due process right to post conviction DNA testing. Br. of Thirty-One States as Amicus Curiae Supporting Pet'r, at 5. This is hardly the case. The statistic cited by *Amici* refer only to the letters received by the Project from prospective clients seeking representation during a one-year period. But the overwhelming majority of those seeking assistance were convicted of crimes that involved no potential DNA evidence of any kind; and in many others, potential DNA evidence had been lost or destroyed. For that reason, in that same one-year period, the California Innocence Project filed *only one* petition for DNA testing in court. Email from Jan Stiglitz, Co-Director, California Innocence Project to

A constitutional right to postconviction DNA testing will likely encourage these trends to continue. Under the limited right proposed by *amici*, a federal claim will arise only if the state has affirmatively denied a request for access to the evidence. Until that point, process has not been initiated and no due process claim has attached. Thus, individuals seeking postconviction DNA analysis will be compelled to first approach prosecutors, who then have the option of avoiding litigation altogether. Only if the prosecutor opposes testing would a due process claim arise. The State can, in effect, control its own exposure to postconviction litigation.

Even in cases where prosecutors refuse, on proper grounds, to allow testing, any resulting litigation is likely to be fairly straightforward and not overly burdensome. If DNA analysis could not conclusively determine culpability—for example, where the evidence to be tested is clearly unrelated to the perpetrator's identity—the constitutional claim is likely susceptible to being rejected on its merits in a simple and non-burdensome way. *See Hudson v. Palmer*, 468 U.S. 517, 553 n.30 (1984) (Stevens, J., concurring in part and dissenting in part) ("Our legal system has developed procedures for speedily

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(continued...)

Charles T. Kotuby Jr., Associate, Jones Day (January 30, 2009, 15:48:00 EST) (on file with author).

disposing of unfounded claims." (internal quotation marks omitted)).

For all of these reasons, *amici* submit that the additional litigation that would result from this Court's recognition of an appropriately defined due process right to DNA testing would be quite modest both in quantity and in the burdens it would pose. It would also be transitional in nature, and would substantially subside after an interval of time in which prosecutors adjust to the new regime in which testing in proper cases—either pre-trial or post-trial—is treated as a matter of right.

Burdens of that sort deserve little or no weight in resolving the question before the Court. The "limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J. concurring). As Justice Harlan observed, the preservation of judicial resources represents "a value judgment on the comparative importance of classes of legally protected interests." *Id.* *Amici* submit that interests of efficiency cannot outweigh the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

CONCLUSION

For all of the foregoing reasons, *amici* urge the Court to affirm the decision below.

Respectfully submitted,

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February 2, 2009

AMICUS CURIAE BRIEF

No. 08-6

IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ELEVEN INDIVIDUALS WHO HAVE RECEIVED CLEMENCY THROUGH DNA TESTING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The question presented in this case touches human lives in a particularly profound way. *Amici* are uniquely positioned to describe that human element and to emphasize the importance of access to evidence that allows one to seek clemency on grounds of actual innocence. Each was wrongfully convicted of a serious crime. And each is one of the 232 people over the past two decades who obtained biological material for DNA testing and, based on the exculpatory results of that testing, received clemency. If these individuals had been convicted in Alaska by petitioners, they could still be in prison today. The *amici* are:

1. Kenneth Adams was exonerated by DNA testing in 1996, eighteen years after being wrongfully convicted in Illinois of rape and murder in what is now known as the Ford Heights Four case. The key evidence in the case consisted of eyewitness testimony placing Adams and the three others near the scene of the crime.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Both parties have filed letters with the Clerk consenting to all *amicus* filings.

Eventually, Adams and the three others gained access to biological material for DNA testing. They also discovered that the police had received information pointing to the identity of the actual perpetrators, but had chosen not pursue the lead. DNA testing exonerated all four men and implicated three others, two of whom confessed and pled guilty to the crime in 1997. Governor Jim Edgar granted pardons to all four men.

2. Marvin Anderson was exonerated by DNA testing in 2001, nineteen years after being wrongfully convicted and imprisoned in Virginia for robbery, forcible sodomy, abduction, and two counts of rape. The victim had told a police officer that her assailant said he "had a white girl," and Anderson was the only black man the officer knew who lived with a white woman. Because Anderson had no criminal record, the officer went to Anderson's employer and obtained a color photo-identification card to show the victim. She identified Anderson as her assailant. The Virginia Bureau of Forensic Science performed serology tests on biological evidence taken from the victim, but the tests proved inconclusive.

At trial in 1982, Anderson pleaded his innocence and suggested that the actual perpetrator of the crime was likely a man named James Otis Lincoln, who had been identified as stealing a bicycle just a half hour before it was used in the rape. The jury nonetheless found Anderson guilty as charged.

In 1988, Lincoln confessed to the crime under oath and in open court, but the judge called Lincoln a liar and refused to vacate Anderson's conviction. A coalition of civil rights groups, church leaders, and state legislators petitioned then-Governor L. Douglas

Wilder for clemency in 1993, but he denied the request. The Commonwealth then told Anderson that all of the biological evidence in his file had been destroyed, pursuant to Virginia's normal procedures for post-conviction cases.

In 2001, however, Anderson learned that some of the evidence had been accidentally preserved in a laboratory notebook. He requested that this evidence be subjected to newly available DNA testing. State authorities initially resisted on the grounds that allowing testing without a prisoner's showing cause would be an undue burden. Later that year the Commonwealth adopted a new statute, Va. Code Ann. 19.2-327.1, which made it easier for prisoners to petition the state's courts for DNA testing. Anderson obtained DNA testing under the new statute that proved his innocence beyond a doubt. Anderson was pardoned by Governor Mark Warner in 2002.

3. A.B. Butler was exonerated by DNA evidence in 2000, after being wrongfully convicted and spending almost seventeen years in a Texas prison for aggravated kidnapping and rape. The victim identified Butler from a book of mug shots and a police lineup. Despite alibi evidence, a jury convicted Butler in 1983 and sentenced him to ninety-nine years in prison. Butler repeatedly appealed and requested that physical evidence from the rape be tested. Finally, in 1999, his lawyer obtained the testing and it excluded him as the source of the semen and hairs found at the scene. He obtained a pardon from then-Governor George W. Bush in May of 2000.

4. Kevin Byrd was exonerated by DNA evidence in 1997, twelve years after being wrongfully

convicted and imprisoned in Texas for rape. The victim initially described her attacker as white, but four months after her rape she saw Byrd, a black man, in a grocery store and told her husband that he was the rapist. Despite shaky evidence and complaints from the trial judge about the poor quality of the investigation, Byrd was convicted of the rape in 1985 and sentenced to life in prison. In 1994, the physical evidence from the rape was supposed to be destroyed to alleviate overcrowding in the evidence warehouse. For unknown reasons, however, the prosecutor's office decided to preserve the evidence.

In 1997, Byrd obtained testing of the biological material, which proved that he did not commit the rape. The judge, district attorney, and sheriff involved in the case all joined in requesting that then-Governor George W. Bush pardon Byrd. The Governor first asked that the DNA test be validated by a court hearing, but granted Byrd a pardon in October 1997.

5. Michael Evans served twenty-six years in prison in Illinois for a rape and murder he did not commit before being exonerated by DNA testing. The State convicted him and his co-defendant, both of whom were black, of raping a white nine-year-old girl based on the mistaken testimony of a witness who came forward in response to a $5000 reward offer.

Although the perpetrator of the crime had left semen in the body of the victim, DNA testing was unavailable at the time of Evans's conviction. After the development of the new technology, Illinois enacted a statute mandating post-conviction DNA testing in cases where the result would likely provide new evidence that might support a claim of actual

innocence. The State Attorney's Office opposed the testing, but Evans ultimately persuaded a court to order it. Testing exonerated Evans, who was released on his own recognizance in 2003 until prosecutors finally agreed to drop the charges against him. He was pardoned in 2005 by Governor Rod Blagojevich.

6. Paula Gray was another defendant in the Ford Heights Four case who was pardoned for innocence in 200? after serving nine years in prison. She was only seventeen and borderline mentally retarded, but the police interrogated her for two days in a hotel room until she confessed to the crime. The confession was used to secure her conviction, as well as the convictions of the other defendants. Gray's conviction was thrown out in 2001, and she was pardoned by Governor George H. Ryan based on innocence a year later.

7. Dana Holland was exonerated by DNA testing in 2003 after serving ten years of a 118-year sentence for two separate wrongful convictions for rape, armed robbery, and attempted murder. Since he was a suspect in the armed robbery and attempted murder only because of his arrest for the rape, his exoneration by DNA evidence for the rape proved his innocence in both crimes. The rape victim initially denied that Holland was her attacker, but changed her mind. Evidence from the armed robbery was found in the car of the rapist, and the armed robbery victim then identified Holland. An initial forensic report stated that there was not enough semen at the scene of the crime for DNA testing. That report, however, was incorrect, and the crime analyst who provided the false report was later discovered to have

provided false forensic testimony in several cases. In 2002, the semen was finally tested and proved that Holland did not commit the rape. Additional testing revealed that Holland's uncle, Gordon Bolden, was the real perpetrator. Holland received a pardon from Governor Rod Blagojevich in 2005.

8. Edward Honaker was exonerated by DNA testing in 1994, over nine years after being wrongfully convicted in Virginia of seven counts of sexual assault and rape. The crime involved a man's attacking a couple while they were sleeping in their car in a rural area. The perpetrator forced one of the victims to go into the surrounding woods and drove away with the other victim in his truck, and raped her repeatedly after arriving at a different location. With help from the victim, the police were able to make a sketch of the assailant. When presented with Honaker at trial, the victims identified Honaker as the perpetrator.

When the Innocence Project pressed to conduct DNA testing on the biological evidence collected in Honaker's case, the prosecution agreed to release the evidence. Three rounds of testing excluded Honaker as the sperm donor to any of the victims. Based on this DNA exclusion, Honaker filed for clemency, and his petition was joined by the Commonwealth. Honaker received a pardon after being incarcerated for nearly ten years.

9. Steven Linscott was exonerated by DNA testing in 1992, after he had served three years in prison and been out on bond for seven years for a wrongful murder conviction in Illinois. The prosecution's case centered on statements Linscott made to police during the investigation in which he

recounted a dream he had the night of the incident that paralleled the crime in several ways. After a new trial was granted, prosecutors agreed to DNA testing, which excluded Linscott. Based on these results, the prosecution chose not to try Linscott again. In December 2002, Linscott was pardoned by Governor George Ryan.

10. Ben Salazar was exonerated by DNA testing in 1997, five years after being wrongfully convicted of aggravated sexual assault of a pregnant woman. The victim identified Salazar as the perpetrator from one of several albums of photographs at the Austin Police Department, and matched a tattoo on the perpetrator to one of Salazar's tattoos. Salazar was convicted in 1992 and sentenced to thirty years in prison.

Seminal fluid was found on items in the rape kit taken from the victim. The fluid initially eliminated the victim's husband as a source, but did not exclude Salazar. After conviction, Salazar's attorneys secured a court order to preserve the evidence, and in 1997, obtained an order to retest the evidence. After three rounds of more sophisticated DNA testing, Salazar was shown conclusively innocent. Then-Governor George W. Bush pardoned Salazar, following the recommendation of the Texas Board of Pardons and Paroles.

11. Earl Washington was exonerated by DNA testing in 2000, sixteen years after being wrongfully convicted and sentenced to death in Virginia. At trial, police officers testified that Washington confessed to a rape and murder about a year after the crime occurred, while in police custody on unrelated charges. In fact, Washington, who has an I.Q. of

approximately sixty-nine, had confessed to five different crimes over two days of police questioning. Four of these confessions were dismissed due to inconsistencies in the testimony and the inability of the victims to identify Washington. His confession to the rape and murder also suffered numerous inconsistencies and misreported basic details about the crime. Nonetheless, the State prosecuted and convicted Washington for the rape and murder, with the confession proving to be the prosecution's sole piece of evidence connecting him to the crime.

On direct appeal, the Virginia Supreme Court affirmed the conviction and death sentence. In August 1985, shortly before he was scheduled to be executed, Washington filed a state habeas corpus petition and was granted a stay of execution. Washington then filed a petition for a writ of habeas corpus in federal district court, asserting that his trial counsel was constitutionally ineffective for failure to "present to the jury the results of certain allegedly exculpatory forensic evidence;" specifically, "the results of exculpatory laboratory tests on semen stains found on a blanket recovered from the bed where the rape of Mrs. Williams occurred." *Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991). The district court ruled that trial counsel's conduct did not fall outside the range of accepted professional conduct and, in any event, that Washington was not prejudiced by the challenged conduct. *See id.* The Fourth Circuit eventually affirmed, holding that, in light of Washington's voluntary confessions, the failure to present the inconclusive laboratory results did not prejudice him.

See Washington v. Murray, 4 F.3d 1285, 1292 (4th Cir. 1993).

After his habeas proceedings had concluded, the Commonwealth in 1993 agreed to analyze the evidence again using more sophisticated DNA testing. The test excluded Washington as the source of the semen found at the crime scene and, on December 20, 1993, Washington filed a petition for clemency with the Virginia governor. The governor commuted Washington's sentence from death to life imprisonment. In 2000, shortly after the advent of Short Tandem Repeat DNA-testing methodology, Washington's lawyers obtained the consent of a new Virginia governor to perform further tests. Not only did the new tests conclusively exculpate Washington, but they were also used to identify the actual perpetrator of the crime. On October 2, 2000, Governor James Gilmore granted Washington a full pardon.

SUMMARY OF ARGUMENT

The historical and current presence of clemency as a source of relief for prisoners who conclusively demonstrate their actual innocence supports a constitutional right to access biological material in a state's control when performing DNA testing on that material could conclusively establish a prisoner's innocence.

I. Throughout American history, executive clemency has provided a "fail-safe" for our criminal justice system, *Herrera v. Collins*, 506 U.S. 390, 415 (1993) – namely, a mechanism for granting relief to prisoners who demonstrate their actual innocence.

Essential to this mechanism has always been the ability of an applicant to present – and the ability of the executive decisionmaker to consider – any newly available evidence of innocence. Crime-scene DNA provides a paradigmatic example of such evidence. DNA testing's unmatched precision gives certain prisoners the ability to demonstrate their innocence beyond dispute. It also gives executives who make clemency determinations the certainty and political cover they sometimes need to confer relief upon applicants.

II. The history and tradition of affording clemency to actually innocent prisoners provides respondent with a liberty interest in this case. *Amici* agree with respondent's argument that he has a liberty interest in meaningful access to the clemency process (along with any other available mechanisms for post-conviction relief). But even if he lacked a liberty interest in access to the clemency process alone, he would nonetheless have a liberty interest in affirmatively obtaining clemency insofar as he has the ability to demonstrate his innocence beyond dispute. In contrast to prisoners who seek clemency on the grounds of mercy or disputable claims of innocence, prisoners who can demonstrate their innocence *beyond dispute* have a legitimate expectation that they actually will receive clemency. Not only have numerous individuals throughout history received pardons on innocence grounds, but since 1989, 232 inmates in thirty-three states have received clemency on the basis of DNA evidence. *Amici* are among these individuals. No American executive of whom we are aware has ever denied

clemency to a prisoner whose innocence he has acknowledged.

III. Denying a prisoner access to biological material that could decisively demonstrate his innocence deprives him of his liberty interest in obtaining clemency without due process of law. Lest there be any doubt on this score, the longstanding tradition of looking to new evidence in clemency proceedings and the widespread practice among the states and federal government allowing DNA testing confirm that petitioners' refusal to grant the access respondent seeks is patently arbitrary. Indeed, petitioners' refusal to allow respondent to conduct a DNA test is worse than arbitrary because they may test the biological material at issue anytime they wish but, under their view of the law, they need not divulge any test results confirming respondent's innocence. This type of one-way ratchet – unsupported by any perceptible governmental interest – reaches beyond arbitrariness into the realm of perversity.

ARGUMENT

I. Clemency Is The "Fail-Safe" For Our Nation's Criminal Justice System.

A. Executive Clemency Historically Has Provided Relief To Innocent Individuals Who Have Been Wrongfully Convicted.

The power of executive clemency developed alongside codified systems of punishment since at least four millennia ago, at the time of Hammurabi's

Code. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 15-16 (1989). Prior to the founding of the United States, clemency was an essential part of the English criminal justice system, and the power to grant it was delegated from the King to the heads of the American colonies. CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 8 (1922). Subsequently, both the American President and the governors of the states were given the power to pardon, although in many states the power is shared with an advisory board. *Id.* at 9-11. Whatever the precise mechanism for granting such relief, the clemency power is now a settled "part of the Constitutional scheme." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

Throughout this history, there have been two major reasons for an executive to grant clemency: mercy and actual innocence. With respect to the first ground, executives sometimes confer leniency on those who are guilty under the letter of the law but undeserving of their punishment. In the words of Hamilton: "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." THE FEDERALIST NO. 74, at 275 (Alexander Hamilton) (Clinton Rossiter ed., 2006); *see also Biddle*, 274 U.S. at 486 ("When [a pardon is] granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.").

At the same time, early leaders of our Nation believed that it was equally, if not more, important

that clemency be available to provide justice to prisoners who had been wrongfully convicted and not granted relief by the judicial system. "The power is given to the executive to relieve against the possible contingency, under all systems of laws, of a wrongful conviction. . . . Under the old common law pardons in case of improper conviction in the absence of provision for new trial . . . were considered as 'grantable of right,' or practically so." James D. Barnett, *The Grounds of Pardon in the Courts*, 20 YALE L.J. 131, 133-34 (1910) (quotation marks omitted); *see also* Richard C. Donnelly, *Unconvicting the Innocent*, 6 VAND. L. REV. 20, 30-31 (1952) (explaining that a pardon is the only option "[w]hen claims of unjust conviction do not fit within existing judicial remedies.").

Though invoked less often than the mercy rationale, this Court, leading treatises, and historical accounts of both the clemency power and wrongful convictions in America have recognized the tradition of executive pardons for the innocent. In *Herrera v. Collins*, this Court explained that clemency is "deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." 506 U.S. 390, 411-12 (1993). Clemency, in other words, is "the 'fail safe' in our criminal justice system." *Id.* at 415. This Court also recognized that "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence." *Id.*

For instance, W. H. Humbert's examination of the President's clemency power, cited in *Herrera*, 506

U.S. at 412, includes a survey of the reasons that the pardon attorney assigned and the Attorney General and the President approved for granting clemency. W. H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 124 (1941). Between 1885 and 1931, three of the "[p]rincipal reasons" for granting clemency were "[g]rave doubt as to justice of conviction," "[d]oubt as to guilt" and "[d]isclosure of new evidence." *Id.* at 124 tbl. V. Less frequently assigned reasons included "[i]nsufficient evidence," "[d]ying confession of real murderer" and "[m]istaken identity." *Id.* at 124 tbl. VI.

Similarly, Edwin Borchard's study of wrongful convictions (conducted at the request of Justice Frankfurter) frequently acknowledges the use of clemency to free innocent prisoners. Among seventy-eight documented cases of wrongful convictions between 1851 and 1931, fifty-five people were freed through either presidential or gubernatorial clemency. *See generally* EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932).

Clemency likewise has been invoked to free wrongfully convicted individuals throughout the twentieth century. Between 1911 and 1991 (about the time that DNA testing became available) at least sixty-three prisoners who had been convicted of death-eligible crimes were freed through executive pardons after proving their innocence. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 283-356 (1992).

B. The Clemency Process Allows The Consideration Of New Evidence Of Innocence, Regardless Of When It Is Discovered.

A critical characteristic of executive clemency that enables it to protect the wrongfully convicted is that, unlike judicial post-conviction proceedings that are litigated solely through the baseline of the trial record, the executive traditionally has the power to consider any factor that is relevant. This power allows prisoners to present new evidence of their innocence at clemency hearings even when such evidence is irrelevant to whether the applicant received a "fair trial" or whether it would be barred from consideration in the courts.

1. Both this Court and legal scholars have recognized the breadth of a clemency determination. Clemency "allow[s] the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81 (1998) (plurality opinion). "In the great majority of states there is no limitation as to the scope of the inquiry" in a clemency proceeding, and a clemency hearing "offers opportunity for the presentation of any kind of evidence, unhampered by legal technicalities as to its admissibility." JENSEN, *supra*, at 46, 49.

This wide scope allows wrongfully convicted prisoners to present new evidence of their innocence when they cannot present it to the courts. Accordingly, "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, *discovered too late in the day to file a new trial motion*, has been executive clemency." *Herrera*,

506 U.S. at 417 (emphasis added). Even when certain states over the years have limited the ability of a clemency authority to second-guess the outcome of judicial proceedings, the states have made exceptions for newly discovered evidence. Maine was one such restrictive state. There, governors have always been allowed to grant clemency, notwithstanding restrictions in the past on their ability to look behind judicial proceedings finding that the applicant committed a crime, if "the evidence raises a doubt as to the guilt of the accused." JENSEN, *supra*, at 47. The same has been true in other states that have restricted the grounds on which an executive could grant clemency. In Maryland, even when such authority was constricted, governors retained the ability to grant clemency if "new evidence has been discovered." *Id.* In Nebraska and New Mexico, clemency remained available despite restrictions if facts "have been learned since conviction." *Id.* at 48. And in Wisconsin, clemency was granted in a restrictive climate when "new and convincing evidence [of innocence] that could not be produced at the trial was presented." *Id.*

2. While new evidence can be considered in clemency proceedings, the burden, as a practical matter, falls on the applicant to produce that evidence. It thus is critical that the applicant have access to any evidence necessary to make out his case.

Although specific state policies vary, the clemency process generally begins when a prisoner fills out an application containing information about himself and his conviction, the reasons for his clemency request, and any supporting documents or

evidence. *See* David R. Dow et al., *Is It Constitutional To Execute Someone Who Is Innocent (And If It Isn't, How Can It Be Stopped Following* House v. Bell*)?*, 42 TULSA L. REV. 277 app. B at 322-399 (2006); Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N. Y. U. L. REV. 136, 146-47 (1964). At that point, the clemency authorities begin some form of investigation into the prisoner's request. *Id.* at 148.

Theoretically, state clemency authorities can conduct as thorough an investigation as they see fit, and some are explicitly granted subpoena powers. *See* Dow, *supra*, app. B at 322-399. In practice, however, any "investigation" that occurs is usually limited to gathering evidence potentially relevant to granting mercy – for example, a compilation of the prisoner's biographical information, the records of his conviction and prison behavior, and occasionally interviews and psychiatric reports. *See* Abramowitz & Paget, *supra*, at 148-50. "[T]he prevailing attitude" of the clemency authorities is that "the investigative agency is not an independent fact-gathering body whose orientation is directed toward the development of new evidence bearing on the guilt or innocence of the defendant." *Id.* at 151.

Nor does any state allow an applicant to invoke the power of the state to undertake any kind of formalized discovery in clemency proceedings. Some state statutes, in fact, specifically note that it is up to the applicant to present evidence of his innocence. In Alabama, for example, a pardon for innocence can only be granted "following receipt and filing of clear proof of [the prisoner's] innocence," as well as "written approval" from the judge or district attorney

associated with the case. Ala. Code § 15-22-36(c). In Georgia, a pardon may be granted "to a person who proves his innocence of the crime for which he was convicted." Ga. Comp. R. & Regs. 475-3-.10(3)(a).

In light of an applicant's burden of proof as well as production, it is imperative that states avoid *standing in the way* of prisoners' procuring post-conviction evidence of their innocence. If states were to obstruct prisoners' access to new, potentially exculpatory evidence, it would be impossible for the prisoners to bring that evidence to the attention of clemency authorities.

C. The Exculpatory Power Of DNA Evidence Makes It Especially Important To Clemency Proceedings.

DNA testing offers a distinctive potential for showing a prisoner's complete innocence. This possibility makes it especially important that prisoners be able to procure and to present DNA-based evidence in clemency proceedings.

1. The "historical scientific developments" in DNA testing "have rendered it literally possible to confirm guilt or innocence beyond any question whatsoever." *Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc). This has resulted in a string of DNA-based exonerations "in numbers never imagined before the development of DNA tests." *Kansas v. Marsh*, 548 U.S. 163, 180 (2006) (Souter, J., dissenting).

In the past twenty years, 232 convicted prisoners have been exonerated by DNA evidence in thirty-three states. Seventeen of these DNA exonerees had

been sentenced to death, and several died while in prison. The average sentence served has been twelve years, for a total of 2894 years wrongfully served. Approximately seventy percent of exonerees have belonged to minority groups, including 138 African Americans, twenty Latinos, and one Asian American. In roughly forty percent of exonerations, DNA testing has successfully identified the actual perpetrator of the crime. And as familiarity with DNA testing's role in exonerations has increased, the number of exonerations has grown, with more than twice as many exonerations in the past decade (167) as in the prior one. *See* The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/351.php (last visited January 31, 2009).

An empirical analysis of our nation's first 200 DNA exonerations shows that, of the 133 prisoners whose cases produced written decisions, seventy percent received no relief of any kind during their appeals or post-conviction court proceedings before DNA testing was done. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 106 (2008). Of the 200 total exonerees, fully twenty-one percent of them were unable for one reason or another to obtain judicial relief even after their exculpatory DNA evidence was discovered. Thus, they were released only after receiving an executive pardon. *Id.* at 129-30. For these prisoners, the historical "fail safe" of clemency was the only way to restore the liberty of which their states had wrongfully deprived them.

2. As a tool for securing clemency by conclusively exonerating wrongfully convicted prisoners, the latest DNA-testing technology has several advantages over

other forms of biological identification techniques, including traditional ABO blood-typing, human-leukocyte-antigen (HLA) typing, and typing of red-cell enzymes and serum proteins through protein-gel electrophoresis. Physical DNA itself "is much more stable and robust than the antigens, enzymes, and proteins examined by the traditional tests, and may be tested from aged and weathered samples which previously could not be typed. DNA tests can also be performed on much smaller tissue samples than traditional tests." 84 A.L.R. 313, § 2(e) (4th ed. 1991) (footnote omitted).

Further, DNA tests "are based directly on the genetic makeup of the individual, the DNA itself. In contrast, serological and protein tests identify a gene product and therefore may be only an indirect reflection of the DNA composition." DEP'T OF JUSTICE, FUTURE OF FORENSIC DNA TESTING 15 (2000). "Most important, from a forensic standpoint, individual variability in the DNA is much greater than can be revealed by serological and enzymatic markers, so that the probability of two unrelated individuals having the same DNA profile is very small." *Id.* With its unique combination of durability and amenability to precise testing, DNA holds the unmatched potential "to supply strong support for identity between, for example, a crime scene sample and DNA from a suspect." *Id.*

3. The unique capacity of DNA testing to conclusively prove innocence even after significant passage of time renders it perfectly suited – if not nowadays essential – to provide the certainty and confidence typically required to secure a pardon on grounds of actual innocence. Executives do not

generally proactively seek opportunities to pardon people convicted of heinous crimes. To the contrary, in order to avoid the perception of being soft on crime, most state governors face political pressure to be tight-fisted with pardons. *See* Evelyn Nieves, *Granting Clemency; Being in the Wrong Place at the Right Time*, N.Y. TIMES, May 9, 1999, § 4, at 5. And even putting such political considerations aside, governors have a duty to protect public safety by ensuring that individuals with violent propensities are not improperly released from custody.

Post-conviction DNA testing is able to solve both of these problems. It provides executives with an unrivaled degree of certainty on which to base their clemency decisions. And it provides unparalleled political cover for freeing innocent prisoners.

This past week brought a typical example of the power of DNA evidence in these respects: the pardon of five people in Nebraska imprisoned for the 1985 rape and murder of a sixty-eight-year-old woman. All had confessed to the brutal crime under the State's threat to seek death sentences. State courts initially denied the prisoners access to crime-scene material for testing on the basis of their belief that the evidence introduced in earlier court proceedings overwhelmingly demonstrated the prisoners' guilt. But after the Nebraska Supreme Court overturned those decisions and allowed the prisoners (pursuant to a state statute) to test the State's evidence, the state attorney general conceded that the testing showed "beyond all doubt" that the five people were innocent. Anna Jo Bratton, *5 Pardoned After Wrongful Conviction in Neb. Crime*, ASSOCIATED

PRESS, Jan. 27, 2009. In absence of any avenue by which the wrongly convicted individuals could seek state post-conviction relief, the governor granted them clemency.

II. A Prisoner Possesses A Liberty Interest In Meaningful Access To The Clemency Process And, In The Rare Case In Which He Can Demonstrate His Innocence, In Obtaining Clemency.

Petitioners assert that a person who has been convicted of a crime lacks any liberty interest in pursuing clemency, even when the person has the ability to show beyond dispute that he is innocent. In petitioners' view, if an innocent person is convicted of a crime through a fair trial that included sufficient evidence for a jury to return a guilty verdict, that person must simply accept his fate – whether it be death, life in prison, or a term of years behind bars.

Petitioners misconceive the nature of clemency. Clemency's traditional role in affording relief to wrongly convicted prisoners gives individuals such as respondent a liberty interest in meaningful access to that process and, indeed, in obtaining clemency insofar as they can demonstrate their innocence beyond dispute.

A. A Prisoner Possesses A Liberty Interest In Meaningful Access To The Clemency Process.

We agree with respondent that there is a liberty interest in meaningful access to clemency. *See* Resp. Br. 27-31. A liberty interest "may arise from an expectation or interest created by state laws or

policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Having granted its prisoners the right to seek clemency, Alaska has given them a constitutionally protected expectation that this right is a meaningful one and not merely an empty formality in which the State may arbitrarily preclude them from demonstrating their innocence.

B. A Prisoner Possesses A Liberty Interest In Obtaining Clemency When He Can Conclusively Prove Actual Innocence.

Even if prisoners in general lack an enforceable liberty interest in access to the clemency process, individuals like the respondent in this case would still have such an interest: when clemency is the only possible source of relief, a prisoner has a protectable liberty interest when he can prove his innocence beyond dispute. Such a prisoner, unlike one who seeks clemency on the basis of a plea for mercy or disputed claim of innocence, has a substantive expectation, confirmed by history and tradition, that clemency will be granted.

Liberty or property interests "are created . . . by existing rules or understandings that stem from an independent source such as state law." *Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (quotation omitted). Accordingly, an actual liberty interest in obtaining clemency can arise only if an individual has not only a right to apply for it, but also "a legitimate claim of entitlement to [receiving] it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *accord Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

Applying this test, this Court has held in cases involving requests for clemency on grounds of mercy that prisoners lack any liberty interest in obtaining clemency. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (involving mandatory clemency review of death sentence); *Dumschat*, 452 U.S. 458 (involving petition for commutation of life sentence). Both by law and tradition, the decision to grant leniency or act on a disputed claim of innocence rests within the complete discretion of the executive. In the mercy context, therefore, prisoners have "no substantive expectation of clemency"; they have only a "unilateral hope" that the executive will show mercy. *Woodard*, 523 U.S. at 280, 283 (Rehnquist, C.J., plurality opinion); *accord Dumschat*, 452 U.S. at 465.

By contrast, cases like *Woodard* and *Dumschat* do not apply when prisoners can indisputably prove that they are innocent. In this small category of cases, history and tradition give rise to prisoners' having a legitimate claim of entitlement to clemency. Unlike a prisoner who merely seeks the exercise of executive mercy, a wrongfully convicted individual "retains a powerful and legitimate interest in obtaining his release." *Kuhlmann v. Wilson*, 477 U.S 436, 452 (1986) (Powell, J., plurality opinion). If he can prove his innocence beyond dispute, in other words, he retains a substantive expectation that he will obtain clemency – even if he received a fair trial that included sufficient evidence to convict.

To be sure, no state law expressly guarantees clemency to anyone – not even to individuals who show themselves to be innocent. Yet an expectation in freedom from restraint need not be guaranteed in

positive state law to give rise to a liberty interest. As Justice Frankfurter observed, "[d]eeply embedded traditional ways of carrying out state policy – or not carrying it out – are often tougher and truer law than the dead words of the written text." *See, e.g., Poe v. Ullman*, 367 U.S. 497, 502 (1961) (plurality opinion) (quotation omitted). Accordingly, "existing rules *or understandings*" that derive from well-settled state practice give rise to liberty interests. *Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (emphasis added).

The settled understanding, undergirded by centuries of experience as well as by hundreds of modern exonerations, is that an applicant who has no available judicial remedies and presents clemency authorities with evidence that conclusively exonerates himself will in fact receive clemency. A pardon under these rare circumstances is not bestowed "as a matter of grace." *Woodard*, 523 U.S. at 282 (emphasis omitted). The executive's motivation is not mercy. Instead, the governor acts according to a social imperative – universally felt and always carried out – of righting a grievous wrong. Indeed, *amici* know of no examples in American history of an executive denying clemency to a prisoner whom he has acknowledged to be innocent.[2] And members of this Court have acknowledged the

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[2] Governors have denied pardons in a few cases in which the exonerated individual was no longer alive or was no longer in prison. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT 168-69, 342-44 (1932); Adam Liptak, *Pardon Unlikely for Civil Rights Advocate*, N.Y. TIMES, May 4, 2006, at A16. These scenarios, of course, do not implicate any interest in freedom from confinement.

"improbab[ility]" of such situation ever "fail[ing] to produce an executive pardon." *Herrera*, 506 U.S. at 428 (Scalia, J., concurring). If this Court's notion of clemency as the "fail-safe" of our criminal justice system, *id.* at 415 (majority opinion), is to have any meaning, it must be that an executive will grant clemency in such cases.

It would be no answer for petitioners to respond that respondent nonetheless lacks a liberty interest because he has not actually shown – through DNA testing or otherwise – that he is indisputably innocent. Liberty interests arise from "*claims* of entitlements to th[e] benefits" at issue. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added).

> Thus, the welfare recipients in *Goldberg v. Kelly*, [397 U.S. 254 (1970)], had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. *The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility.* But we held that they had a right to a hearing at which they might attempt to do so.

Id. (emphasis added). The same is true here: although respondent has not yet proven that he is actually innocent, he has a liberty interest in obtaining clemency because he is incarcerated and *could* demonstrate beyond doubt that he is, in fact, innocent.

This Court's jurisprudence concerning physical confinement for criminal conduct bears out this reality. In *In re Winship*, for example, the Court held

that a due process liberty interest existed in freedom from restraint when a state fails to establish guilt beyond a reasonable doubt, even though state law did not create such an entitlement and even though the defendant had not yet shown whether the state's proof fell short of that mark. 397 U.S. 358 (1970). The Court noted that the requirement of proof beyond a reasonable doubt "dates at least from our early years as a Nation" and "plays a vital role in the American scheme of criminal procedure." *Id.* at 361, 363. Such commitment to an unwritten principle, the Court reasoned, "reflect[ed] a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (quotation omitted); *see also id.* at 372 (Harlan, J., concurring) (noting "the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials"); *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (noting that proof beyond reasonable doubt had "traditionally been regarded as the decisive difference between criminal culpability and civil liability."). That being so, this Court concluded that individuals have a liberty interest in remaining free from criminal punishment absent a state's satisfying the reasonable-doubt standard. *In re Winship*, 397 U.S. at 364.

The Court undertook a similar analytical approach when it concluded that the Due Process Clause also mandates a presumption of innocence instruction in criminal trials. *See Taylor v. Kentucky*, 436 U.S. 478 (1978). Looking to history and tradition, the Court remarked that the presumption is "axiomatic and elementary, and its enforcement lies at the foundation of the

administration of our criminal law." *Id.* at 483 (quotation omitted); *see also Coffin v. United States*, 156 U.S. 432 (1895) (tracing the history of the presumption).

Like the liberty interest in remaining free from confinement absent proof of criminal conduct beyond a reasonable doubt, the expectation of being released from confinement (through clemency if necessary) upon a showing of actual innocence is "deeply rooted" in our history and plays a critical role in our criminal justice system. *See Herrera*, 506 U.S. at 411-12. A state may no more arbitrarily deny an individual the ability to *avoid* physical confinement through the presumption of his innocence than it may arbitrarily deny him the ability to *end* his confinement through clemency by showing his actual innocence.

III. In Order To Protect The Liberty Interest In Clemency For Conclusively Innocent Prisoners, The State Must Grant Respondent DNA Testing.

Because prisoners have a liberty interest in receiving clemency when they are actually innocent and can prove so conclusively, due process demands that they be able to access potentially exculpatory DNA evidence to protect that interest. We agree with respondent that the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), weighs decidedly in favor of allowing prisoners in respondent's position access to DNA evidence. We further agree that the "narrower," tradition-related inquiry of *Medina v. California*, 505 U.S. 437, 445 (1992), is inapplicable here and that even if the *Medina* test were to be applied, the respondent satisfies it. *See Harvey*, 285

F.3d at 315 n.6 (Luttig, J., respecting the denial of rehearing en banc).

We add here two points. First, holding that prisoners in respondent's position are entitled to perform DNA testing on biological material in the state's control would accord with longstanding tradition concerning the ability of applicants to present new evidence in clemency proceedings. Second, the petitioners' refusal to give respondent the process he seeks is not just arbitrary but worse than arbitrary: they are exercising unilateral authority over the biological material at issue so that they could use it to their advantage but respondent cannot.

A. Longstanding Tradition Supports The Modest Process Respondent Seeks.

1. Requiring Alaska to grant respondent access to biological material in its possession would comport with the longstanding tradition of allowing prisoners to seek clemency based on new evidence of actual innocence. As described *supra* in Part I.B, the ability to introduce new evidence of innocence has historically been a salient feature of clemency. Every state permits applicants to seek clemency based on new evidence of actual innocence. This tradition is buttressed today by the specific statutory and administrative procedures adopted in many states that permit prisoners to introduce new evidence while seeking clemency. *See supra* Part I.B. Indeed, if prisoners were blocked from procuring and presenting new evidence to clemency authorities, it would be virtually impossible for them to obtain clemency on grounds of innocence.

2. That the overwhelming majority of states already allow prisoners to access state-held biological material for DNA testing reinforces the importance of such testing for prisoners seeking to prove their innocence and the unique injustice of arbitrarily withholding this evidence from prisoners. Forty-four states, the District of Columbia, and the federal government have enacted statutes that give prisoners the ability to access DNA evidence held by the state after their conviction.[3] Five other states have granted such access as a matter of practice. *See* Resp. Br. 6-7.

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[3] 18 U.S.C. § 3600; Ariz. Rev. Stat. § 13-4240; Ark. Code Ann. § 16-112-202; Cal. Penal Code § 1405; Colo. Rev. Stat. § 18-1-413; Conn. Gen. Stat. Ann. § 52-582; Del. Code. tit. 11, § 4504; D.C. Code Ann. §§ 22-4133, -4135; Fla. Stat. Ann. § 925.11; Ga. Code Ann. § 5-5-41; Haw. Rev. Stat. § 844D-123; Idaho Code § 19-4902; 725 Ill. Comp. Stat. Ann. 5/116-3; Ind. Code Ann. § 35-38-7; Iowa Code § 81.10; Kan. Stat. Ann. § 21-2512; Ky. Rev. Stat. § 422.285; La. Code Crim. Proc. Ann. art. 926.1; Me. Rev. Stat. Ann. tit. 15, § 2137; Md. Code Ann., Crim. Proc. § 8-201; Mich. Comp. Laws § 770.16; Minn. Stat. § 590.01; Mo. Rev. Stat. § 547.035; Mont. Code Ann. § 46-21-110; Neb. Rev. Stat. § 29-4120; Nev. Rev. Stat. § 176.0918; N.H. Rev. Stat. Ann. § 651-D:2; N.J. Stat. Ann. § 2A:84A-32a; N.M. Stat. Ann. § 31-1a-2; N.Y. Crim. Proc. Law § 440.30(1-a); N.C. Gen. Stat. § 15A-269; N. D. Cent. Code Ann. § 29-32.1-15; Ohio Rev. Code Ann. § 2953.72; Or. Rev. Stat. § 138.690; Pa. Stat. Ann. 42 § 9543.1; R.I. Gen. Laws § 10-9.1-11; S.C. Code Ann. § 17-28-30; Tenn. Code Ann. § 40-30-304; Tex. Code Crim. Proc. Ann. art. 64.01 *et seq*, Utah Code Ann. § 78B-9-300 *et seq*, Vt. Stat. Ann. tit. 13, § 5561; Va. Code Ann. § 19.2-327.1; Wash. Rev. Code § 10.73.170; W. Va. Code Ann. § 15-2B-14; Wi. Stat. Ann. § 974.07; Wyo. Stat. Ann. § 7-12-303.

These statutes and practices are integral to facilitating the process of clemency. While every state except Alaska regularly or at least sometimes grants prisoners access to potentially exculpatory DNA evidence, many do not provide a mechanism for seeking post-conviction relief upon a showing of innocence, thus leaving clemency as the sole avenue of relief. *See* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 356 (2002). Accordingly, a substantial number of prisoners who obtain exculpatory DNA evidence turn to clemency as their only avenue of relief. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 120 (2008).

Ruling for the respondent, in short, would simply require Alaska to abide by the widespread practice in the vast majority of states. And that current practice reflects nothing more than the time-honored principle that prisoners should be able to procure and present new evidence of innocence in clemency proceedings.

B. Alaska's Refusal To Permit Access To DNA Evidence Is Worse Than Arbitrary.

Alaska's refusal to grant respondent access to the biological material he seeks is "shockingly arbitrary." *Harvey*, 285 F.3d at 319 (Luttig, J., respecting the denial of rehearing en banc). The material is in the state's control, and it is easily reachable. If a DNA test of the material excludes respondent as a source, then respondent is undeniably innocent of the crime for which he is imprisoned. What is more, the material's relevance with respect to respondent's ability to seek clemency is unique: the DNA it

contains is the *only* evidence in existence that can conclusively demonstrate whether he is guilty or innocent of the crimes for which he is incarcerated. *See supra* Part I.C. That petitioners assert a right to withhold material – the only material – that could exculpate an innocent and incarcerated man is, to say the least, unsettling.

Even more disturbing are the implications of the State's unilateral exertion of control over the biological material. Because the State has the material, petitioners could perform a DNA test at any time, whether to combat a clemency application or for any other reason. Yet under the petitioners' view of the law, under which the disclosure obligations of *Brady v. Maryland,* 373 U.S. 83 (1963), no longer apply after the State has obtained a conviction, they would not have any obligation to disclose an exculpatory result. *See* Petr. Br. 36-38; U.S. Br. 12-13. This type of one-way ratchet – allowing the state to use DNA testing to beat back challenges to convictions but declining to require it to accept the consequences of the occasional flip side of such testing – flouts any possible sense of fair play. Indeed, it is perverse. Accordingly, "if not satisfactorily supported by these longstanding legal traditions and established practices, then the right of access might very well be grounded in the patent arbitrariness of denying access to such evidence in the absence of any governmental interest whatsoever in the withholding of such." *Harvey*, 285 F.3d at 319 (Luttig, J., respecting the denial of rehearing en banc).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, *et al.*,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE INDIVIDUALS EXONERATED BY POST-CONVICTION DNA TESTING IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 08-6

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, *et al.*,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICI CURIAE

Amici Kirk Bloodsworth, Kennedy Brewer, Roy Brown, Jeffrey Deskovic, Dennis Fritz, Bruce Godschalk, Kevin Green, Ray Krone, Christopher Ochoa, and Anthony Robinson were all exonerated after post-conviction testing of DNA evidence demonstrated that they had not committed the crimes of which they were convicted.[1] Amici's experiences

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

have left them committed to seeking the recognition of the constitutional rights of prisoners to obtain access to DNA evidence and to be released from custody if such evidence demonstrates their innocence. They are uniquely positioned to aid the Court in understanding the significance of its decision not only for Respondent but for others who, like amici, were wrongfully imprisoned, and who could be exonerated if afforded access to DNA evidence.

INTRODUCTION

Since 1989, post-conviction testing of DNA evidence has exonerated at least 232 individuals in the United States—including five in the last week.[2] The extraordinary potential of DNA evidence to identify the perpetrator of a crime places it at the heart of criminal justice's function: "to convict the guilty and free the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993). This case requires the Court to confront whether a state may constitutionally withhold such potentially powerful evidence from a prisoner, despite conceding that a favorable result would conclusively exonerate him.

In this brief, amici will address three issues. First, amici argue that a right of post-conviction access to evidence for DNA testing should extend to individuals for whom the proof of guilt appears overwhelming—as was the case for the great majority of amici at the time they secured testing—so long as a favorable result would demonstrate innocence. Second, amici argue

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[2] Anna Jo Bratton, *5 Pardoned After Wrongful Conviction In Neb. Crime*, A.P., Jan. 27, 2009 (describing pardon of five individuals who falsely confessed to 1985 rape-murder).

that this Court should recognize a "freestanding" actual innocence claim—that is, that the continued incarceration of an individual who has presented truly persuasive new evidence of actual innocence is constitutionally intolerable. Third, amici argue that, whether or not this Court recognizes a freestanding actual innocence claim today, Respondent's suit seeking access to evidence is cognizable under 42 U.S.C. § 1983.

I. THE COURT SHOULD RECOGNIZE A CONSTITUTIONAL RIGHT OF POST-CONVICTION ACCESS TO DNA EVIDENCE EXTENDING TO INDIVIDUALS FOR WHOM EVIDENCE OF GUILT APPEARS OVERWHELMING

For the reasons set forth in Respondent's brief (at 27-45), amici urge this Court to recognize a constitutional right of post-conviction access to DNA evidence. Petitioners and the United States suggest that, if a constitutional right exists, it should be limited to cases where the prisoner's guilt is already in serious doubt. *See* Pet. Br. 36; U.S. Br. 25-26. Amici urge the Court to reject this position and to hold instead that a court must assume that the results will be exculpatory when evaluating whether withholding such evidence violates due process. As the following accounts make clear, the evidence against amici when they sought testing compellingly indicated guilt. A number of amici had, like Respondent, confessed to the crime, or were alleged to have admitted guilt to jailhouse informants. In several of amici's cases, as in Respondent's case, jurors and reviewing courts alike found forensic evidence, such as "matches" of microscopic hair features, bite marks, or shoeprints, to be convincing evidence of guilt. And several amici were, like Respondent, positively identified by the crime's victims. Petitioners' suggested limitation on the right

would exclude from relief the majority of amici and many other actually innocent incarcerated individuals.

A. False Confessions And Jailhouse Informants

1. Bruce Godschalk

In the summer of 1986, two women living in a housing complex in Montgomery County, Pennsylvania, were raped.[3] Police believed that a single perpetrator had committed both rapes, and, based on the victims' descriptions, prepared a drawing of the suspect. Bruce Godschalk's sister saw the drawing and called the police, leading to his arrest and an audiotaped confession to the crimes.

On the tape, Godschalk narrated twenty separate details of the rapes that had not been released to the public. The prosecutor presented the tape to the jury as overwhelming evidence of Godschalk's guilt, arguing that "it was a 'mathematical impossibility' that Godschalk could have guessed correctly on so many nonpublic facts regarding how the crime was committed."[4] In fact, detectives had supplied these facts to Godschalk during the interrogation through the use of leading questions.[5] In addition to the confession,

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[3] Unless otherwise indicated, the facts in this section are drawn from Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence And Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 547-51 (2002); *Godschalk* v. *Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 367-70 (E.D. Pa. 2001).

[4] Brandon L. Garrett, *The Substance Of False Confessions* 20 (Oct. 22, 2008) (quoting Trial Tr., *Commonwealth* v. *Godschalk*, No. 00934-87 (May 27, 1987) at 22), <tinyurl.com/falseconfessions>.

[5] *See id.* at 22-23.

the prosecutor presented an identification by one of the two victims and the statement of a jailhouse informant that, while in custody, Godschalk had admitted committing the crimes. The jury convicted him of both rapes.

After unsuccessful post-trial motions and appeal, Godschalk asked a Pennsylvania court to order the District Attorney to turn over for DNA testing seminal residue samples obtained from the victims. Although Pennsylvania was then among the few states whose courts recognized a limited post-conviction right to access such evidence, the court denied the petition on the ground that Godschalk's conviction did not rest "largely on identification evidence," but instead on his own confession. *See Commonwealth* v. *Godschalk*, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996) (italics omitted). Godschalk then filed a Section 1983 claim in federal district court. Despite the seemingly "overwhelming evidence" of guilt, the district court recognized that the "well-known powerful exculpatory effect" of DNA testing could raise doubts in the minds of reasonable jurors as to Godschalk's guilt and granted the motion. *Godschalk* v. *Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 367, 370 (E.D. Pa. 2001) (internal quotation marks omitted).

Two independent laboratories confirmed the police theory that the semen collected from the two crimes came from a single perpetrator, but excluded Godschalk as the source of the semen. Fifteen years after sentencing, the Commonwealth released Godschalk from prison.[6] Four months later, the

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[6] The prosecutor did not immediately consent to Godschalk's release, saying that he believed the tests were flawed, and

legislature enacted a post-conviction DNA testing statute, 42 Pa. Cons. Stat. § 9543.1.[7]

2. Christopher Ochoa

In 1989, Christopher Ochoa and Richard Danziger had a meal at a Pizza Hut in Austin, Texas, that had recently been the scene of the brutal rape and murder of Nancy DePriest.[8] A worker overheard them talking about DePriest and thought their behavior suspicious. Police brought in Ochoa, then 22, for questioning, showed him horrifying photos of the crime scene, and

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Godschalk remained in jail for another two weeks. *See* Sara Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, N.Y. Times, Feb. 15, 2002, at A12. An even greater delay occurred in the case of Douglas Warney, where prosecutors actually withheld an exculpatory DNA test result. They had submitted DNA evidence for testing without telling Warney, while simultaneously opposing his state-court petition for access. *See Warney* v. *City of Rochester*, 536 F. Supp. 2d 285, 289-90 (W.D.N.Y. 2008). Test results excluded Warney and a CODIS database search inculpated Eldred Johnson—who had committed further crimes, including stabbing three people, while Warney was serving time for the murder Johnson committed, *see* Jim Dwyer, *Inmate To Be Freed As DNA Tests Upend Murder Confession*, N.Y. Times, May 16, 2006, at B1—but prosecutors did not inform Warney of the result until two months later. *Warney*, 536 F. Supp. 2d at 290.

[7] *See* Amie Parnes, *Schweiker Signs Law Letting Convicts Seek DNA Testing*, Phila. Inquirer, July 11, 2002, at B1. Ironically, under recent decisions, Godschalk himself would be unable to obtain DNA evidence under the statute passed in the wake of his exoneration. *See Commonwealth* v. *Wright*, 935 A.2d 542, 543 (Pa. Super. Ct. 2007) (holding that prisoner who confessed did not qualify for relief), *appeal granted*, 951 A.2d 263 (Pa. 2008).

[8] The facts in this section are drawn from Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002.

told him that he would get the death penalty if he did not confess and implicate Danziger. Terrified, Ochoa confessed to the crime and agreed to plead guilty and testify against Danziger. At Danziger's trial, the prosecution introduced forensic evidence that semen found at the scene could have belonged to ten to sixteen percent of the Hispanic population, including Ochoa, and microscopic hair analysis indicating that a hair found at the scene was consistent with Danziger's hair. Ochoa and Danziger were both sentenced to life in prison.

In 1996 and again in 1998, Achim Marino, having experienced a religious conversion, wrote letters to the police and prosecutors confessing to the murder and describing where he had buried the gun and handcuffs used in the crime. When police reinvestigating the crime first approached Ochoa, he continued to assert his guilt because he feared jeopardizing his chances for parole.[9] Danziger had sustained head injuries from a beating by a fellow inmate and was in a mental institution. But Ochoa subsequently requested Short Tandem Repeat (STR) DNA testing of the biological

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[9] Prisoners are aware that confessing guilt will improve their chances of obtaining parole. *See* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences Of Failing To Admit Guilt At Parole Hearings*, 93 Iowa L. Rev. 491, 538 (2008) (observing that inmates are often aware of parole criteria and tailor their presentations accordingly). For example, former Utah prisoner Bruce Dallas Goodman, like Respondent, confessed to a parole board; Goodman was later exonerated. *See id.* at 523-28; *see also id.* at 515 (observing that Utah parole board uses "Rationale Sheet" that "designates complete acceptance of responsibility as a mitigating factor"). Like Utah, the Alaska Board of Parole considers acceptance of responsibility in making parole determinations. *See* Alaska Admin. Code tit. 22, § 20.165(c)(12).

evidence, the results of which exculpated both Ochoa and Danziger and inculpated Marino. After twelve years in prison, Ochoa enrolled at the University of Wisconsin Law School and is now a practicing attorney.

3. Jeffrey Deskovic

In January 1990, Jeffrey Deskovic, a 16-year-old high school sophomore from Westchester County, New York, with no criminal background, was arrested in connection with the rape and murder of his 15-year-old classmate.[10] Police investigators had administered a polygraph test and told Deskovic that he had failed, whereupon Deskovic confessed.

Prosecutors obtained an indictment based on the confession, despite the fact that they were still awaiting the results of early-generation DNA testing of semen from the crime scene. Three days after the indictment was filed, those tests excluded Deskovic as the source of the semen, but the state proceeded with the prosecution, theorizing that the semen might have come from an unknown consensual sexual partner of the victim's, and Deskovic was convicted.

As a 2007 report commissioned by the Westchester County District Attorney later concluded, "[f]ollowing his conviction and sentence, Deskovic received all of the traditional elements of post-judgment due process, but he obtained no relief."[11] The Appellate Division

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[10] Unless otherwise indicated, the facts in this section are drawn from Leslie Crocker Snyder, et al., *Report On The Conviction Of Jeffrey Deskovic: Prepared At The Request Of Janet DiFiore, Westchester County District Attorney* 1-4, 20, 22, 31 (June 2007).

[11] *Id.* at 4.

affirmed his conviction, concluding that his confession was "overwhelming evidence" of guilt and finding no "indication in the record that the defendant's extensive statements . . . were precipitated by a coercive environment or police misconduct that could induce a false confession." *People* v. *Deskovic*, 607 N.Y.S.2d 957, 957 (App. Div. 1994) (internal quotation marks omitted). Deskovic's subsequent federal habeas petition was dismissed as time-barred, *see Deskovic* v. *Mann*, No. 97 Civ. 3023, 1997 WL 811524, at *2 (S.D.N.Y. Nov. 20, 1997), apparently due to an error by his attorney.

Over the next ten years, Deskovic repeatedly requested that evidence from the crime be compared against records in state and federal DNA databases, but prosecutors denied his requests and courts refused to compel them to act. In June 2006, however, a newly-elected District Attorney agreed to perform an STR DNA analysis and database search, which inculpated Steven Cunningham, who was then serving a life sentence for an unrelated murder committed in 1993.[12] In late 2006, after Deskovic had been incarcerated for nearly seventeen years—more than half his life—the District Attorney consented to his immediate release. Cunningham later confessed and pleaded guilty to the crime.

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[12] Jim Fitzgerald, *Convict Freed After 16 Years Sees Real Killer Sentenced In Murder*, A.P. State & Local Wire, May 3, 2007.

4. Dennis Fritz and Ron Williamson

In 1982, Debra Sue Carter was raped and murdered in Ada, Oklahoma.[13] The crime went unsolved for five years. Police approached Ron Williamson because he lived near the apartment where Carter was murdered and had a reputation for vulgar language and a bad temper. Suspicions about Williamson then led police to question Williamson's only friend, Dennis Fritz, a junior high school science teacher and widower with one daughter.

The prosecution's case was built around the testimony of a jailhouse informant, Terri Holland.[14] Holland, who was facing check-kiting charges, told police that during a previous stint in jail she had heard Williamson confess that he had killed Carter. The police arrested Williamson and Fritz, theorizing that Fritz had been present when Williamson committed the crime. At trial, two other men testified that Fritz, while in jail awaiting trial, had confessed to them. Another witness, Glen Gore, testified that he had seen Williamson at the bar where Carter was working on the night of the murder, and that Carter had told him that Williamson was bothering her. An expert also testified that several hairs found on the victim were microscopically consistent with Williamson's and

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[13] Unless otherwise indicated, the facts in this section are drawn from Barry Scheck, et al., *Actual Innocence* 168-203 (2003).

[14] Holland had previously provided police with testimony about another supposed jailhouse confession that led to the conviction of one Karl Fontenot for a different long-unsolved murder.

Fritz's.[15] Williamson was sentenced to death, Fritz to life in prison.

Williamson's direct appeals failed. Only five days before his scheduled execution, a federal district court issued a stay and subsequently granted his habeas petition, concluding that Williamson's defense counsel had been ineffective in failing to request a competency hearing to evaluate Williamson's mental health. *See Williamson* v. *Reynolds*, 904 F. Supp. 1529, 1545 (E.D. Okla. 1995), *abrogated on other grounds by Nguyen* v. *Reynolds*, 131 F.3d 1340, 1353-54 (10th Cir. 1997). In preparation for retrial, prosecutors submitted the hairs and other biological evidence from the crime scene for DNA testing and agreed to compare the results against samples from both Williamson and Fritz. The tests exculpated both men, and inculpated Glen Gore, the witness who had testified against Williamson. After eleven years of incarceration, Fritz was reunited with his daughter, who was thirteen when he was convicted. Williamson died in 2004 of cirrhosis of the liver.[16]

B. Forensic Evidence

1. Kennedy Brewer

In March 1995, Kennedy Brewer was convicted and sentenced to death in Mississippi for the rape and murder of the 3-year-old daughter of Brewer's

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[15] *See* Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability And Minimizing Wrongful Convictions*, 43 Tulsa L. Rev. 285, 302 (2007).

[16] Jim Dwyer, *Ronald Williamson, Freed From Death Row, Dies At 51*, N.Y. Times, Dec. 9, 2004, at C11.

girlfriend.[17] The victim disappeared from Brewer's girlfriend's house one morning after Brewer had spent the night there, and, when her body was found in a nearby creek two days later, semen was recovered from the victim and her clothes. The victim's body bore a number of marks that the state's forensic odontologist, Dr. Michael West, considered to be bite marks. Dr. West testified that five of the bite marks on the victim's body had been inflicted by Brewer.[18]

The Mississippi Supreme Court affirmed Brewer's conviction, observing that "[t]he circumstances in this case consistently point to Brewer's guilt." *Brewer* v. *State*, 725 So. 2d 106, 134 (Miss. 1998). The court laid special emphasis on the strength of the bite-mark evidence, noting that "[t]he photographs of the doctor's direct comparison test buttress his opinion. Brewer's teeth contained several unique characteristics that are evident in the photos." *Id.*

Shortly after his appeal was denied, Brewer filed a petition for post-conviction relief, arguing that he was

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[17] Unless otherwise indicated, the facts in this section are drawn from *Brewer* v. *State*, 725 So. 2d 106, 113-16 (Miss. 1998); *Brewer* v. *State*, 819 So. 2d 1165, 1166, 1168 & n.1 (Miss. 2000); *Brewer* v. *State*, 819 So. 2d 1169, 1171-72 (Miss. 2002); Shaila Dewan, *New Suspect Is Arrested In Mississippi Killings In Which 2 Men Were Convicted*, N.Y. Times, Feb. 8, 2008, at A11; Shaila Dewan, *Despite DNA Result, Prosecutor Retries A '92 Rape-Murder Case*, N.Y. Times, Sept. 6, 2007, at A1.

[18] A panel of forensic experts who later examined the evidence concluded that the marks that Dr. West relied upon were not human bite marks, but were probably caused by crawfish and insects, decomposition, and rough treatment when the body was recovered. *See* Shelia Byrd, *Mississippi Autopsies Being Questioned*, A.P., Mar. 6, 2008.

denied the opportunity at trial to submit biological evidence for DNA testing. The Mississippi Supreme Court denied the petition, but noted that Brewer should be given access to the state's evidence for post-conviction testing. DNA tests conducted in 2001 excluded Brewer as the source of the semen recovered from the victim; nonetheless, prosecutors remained convinced of his guilt, and sought a new trial for capital murder, pending which he remained in jail. In 2006, a new prosecutor assumed responsibility for Brewer's retrial and decided not to seek the death penalty, rendering Brewer eligible for bail. In August 2007, after 15 years of incarceration, and six years after the exculpatory DNA test, Brewer was released on bail.

Brewer's lawyers later discovered that another man, Justin Johnson, had previously been a suspect in both the crime of which Brewer was convicted and another, similar rape-murder of a young girl. Testing in 2007 indicated that semen recovered from the victim's body in Brewer's case belonged to Johnson, and in February 2008 Johnson was arrested and confessed to both murders. Another man, Levon Brooks, who had earlier been convicted of the second murder based in part on bite-mark testimony by Dr. West, was likewise exonerated.[19]

2. Ray Krone

In 1992, Ray Krone, a former Air Force sergeant with no prior criminal record, was convicted of the

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[19] Shelia Byrd, *Bite-Mark Testimony Is Disputed In Two Mississippi Murder Cases; Defendants Have Both Gone Free*, A.P., Feb. 29, 2008; *Miss. Man Cleared In 1990s Child Murder Case*, A.P. State & Local Wire, Mar. 13, 2008.

murder of a bartender and sentenced to death.[20] The prosecution's case rested principally on testimony from a forensic odontologist that Krone's teeth perfectly matched bite marks found on the victim's breast—for which Krone became known as the "snaggletooth killer."

Krone subsequently filed a request in Arizona state court for STR DNA testing of the saliva found on the victim's blouse and previously-untested blood on the victim's jeans. The government opposed the request on the ground that Krone had insufficiently impeached the scientific evidence used at trial. But the court granted Krone's request, and testing of the saliva and blood yielded a "hit" in the CODIS database, inculpating a man who was in an Arizona prison for attempting, shortly after committing the murder of which Krone was convicted, to sexually assault a child. Krone was released after spending ten years in prison, including almost three years on death row.

3. Roy Brown

In January 1992, Roy Brown was convicted and sentenced to 25 years to life in New York for the murder of a social services worker.[21] At trial, a dentist

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[20] The facts in this section are drawn from Robert Nelson, "*About Face*," Phoenix New Times, Apr. 21, 2005; Rachel King, *Capital Consequences: Families Of The Condemned Tell Their Stories* 12-48 (2005).

[21] Unless otherwise indicated, the facts in this section are drawn from *People* v. *Brown*, 162 Misc. 2d 555, 556 (N.Y. Cayuga County Ct. 1994); *Brown* v. *New York*, 2008-009-029, Claim No. 113684 (N.Y. Ct. Cl. Oct. 20, 2008); Fernanda Santos, *With DNA From Exhumed Body, Man Finally Wins Freedom*, N.Y. Times, Jan. 24, 2007, at B5.

testified that bite marks on the victim showed a bite pattern, including three missing teeth, identical to Brown's. Other witnesses testified that Brown had threatened social services workers for taking his child away from him, and that after the murder he had admitted that he had killed a woman.

In 1994, before the enactment of New York's DNA-access statute, Brown brought a suit seeking DNA testing of saliva samples taken from the scene. The court denied his request, stating that "[f]or a court to willy-nilly tamper with verdicts long after their determination is extremely prejudicial to the People." *People* v. *Brown*, 162 Misc. 2d 555, 558 (N.Y. Cayuga County Ct. 1994). When New York enacted a post-conviction DNA statute later in 1994, Brown again sought relief, but the court held that Brown had made an insufficient showing under the new law that testable DNA evidence still existed.[22]

While in prison, Brown tried to identify the real perpetrator. He obtained police records via a freedom of information law request and found among the records documents implicating another local man, Barry Bench.[23] Brown wrote to Bench from prison accusing him of the crime; shortly after receiving this letter, Bench committed suicide. In 2006, Brown sought again to have the saliva samples tested, and this

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[22] Teresa Starr Fugit, *Convicted Killer Loses DNA Ruling*, Post-Standard (Syracuse, N.Y.), July 29, 1995, at A5.

[23] Fernanda Santos, *Inmate Finds Vindication In His Quest For A Killer*, N.Y. Times, Dec. 20, 2006, at B1.

time, the prosecutor consented.[24] After DNA tests excluded Brown as the source of the saliva and showed a similarity to DNA samples taken from Bench's daughter, Bench's body was exhumed, and tests confirmed that he had been the perpetrator. After serving fifteen years of his sentence, Brown was released in January 2007.

4. Kirk Bloodsworth

In 1985, Kirk Bloodsworth, a 24-year-old former Marine with no criminal background, was convicted and sentenced to death in Maryland for the rape and murder of a 9-year-old girl.[25] An anonymous tipster had informed police that Bloodsworth had been seen with the victim on the day of the murder, and five witnesses testified at trial that they had seen Bloodsworth with the victim. Testimony further showed that a shoeprint found near the victim's body was the same size as Bloodsworth's. Bloodsworth himself had told acquaintances that he had done something "terrible" that day that would affect his marriage. Finally, Bloodsworth had mentioned a "bloody rock" during his first interrogation, a detail allegedly known only to the police. On appeal,

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[24] John Stith, *Another Chance For Convicted Murderer*, Post-Standard (Syracuse, N.Y.), Apr. 21, 2006, at A1.

[25] Unless otherwise indicated, the facts in this section are drawn from 149 Cong. Rec. S11751 (daily ed. Sept. 22, 2003) (statement of Sen. Leahy); Edward Connors, et al., *Convicted By Juries, Exonerated By Science: Case Studies In The Use Of DNA Evidence To Establish Innocence After Trial* 35-37 (U.S. Dep't of Justice, Nat'l Instit. of Justice, June 1996); James Dao, *In Same Case, DNA Clears Convict And Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7.

Bloodsworth argued that the police had withheld information regarding another possible perpetrator, and explained that he had mentioned the "bloody rock" because the police had placed it next to him on the table during his interrogation and that the "terrible" thing he had done was failing to buy some Mexican food he had promised his wife. The Maryland Court of Appeals overturned the conviction on the basis of the withheld information, but Bloodsworth was convicted on retrial and sentenced to two consecutive life terms.

Bloodsworth later requested to have biological evidence subjected to DNA testing that had not been available at the time of trial. The prosecution consented to testing, and, in 1993, the results of those tests excluded Bloodsworth as the source of semen found on the victim's underwear. After nearly nine years in prison, including two years on death row, Bloodsworth was ordered released in June 1993, and received a gubernatorial pardon in December 1993. Nonetheless, prosecutors refused to concede Bloodsworth's innocence. It was not until ten years later, when the evidence was re-tested using STR DNA and a search of the CODIS database yielded a "hit" on the real killer—a convicted sex offender—that the assistant state's attorney who had originally prosecuted Bloodsworth apologized for the prosecution and convictions. Bloodsworth was the first person who had previously been sentenced to death to have his conviction vacated based on DNA evidence.[26]

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[26] Since his release, Bloodsworth has become active as an advocate for criminal justice reform. *See* Stephanie Hanes, *New Peace, New Purpose*, Baltimore Sun, Oct. 24, 2003, at 1A. Recent federal legislation includes a program named in honor of

C. Misidentified By Victims

1. Kevin Green

In 1980, Kevin Green, a 21-year-old Marine corporal, was convicted in California of second-degree murder and attempted murder after the severe beating of his wife resulted in the stillbirth of their unborn daughter.[27] Tests of semen samples collected from the victim, before the advent of DNA testing, failed to exclude Green as the source.

Green was convicted largely on the basis of his wife's testimony. She suffered brain damage in the attack and initially remembered nothing about it, but she testified at Green's trial that, three months later, she had suddenly regained memory and recalled that her husband had assaulted her when she refused to have sex with him.

Green was exonerated in 1996 when state investigators running semen samples from unsolved cases against a new state DNA database matched several to a convicted rapist, Gerald Parker, who then confessed to the attack on Green's wife. Subsequent testing of the evidence from that attack inculpated

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Bloodsworth, the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, which provides for funding for the states for post-conviction DNA testing. *See* 42 U.S.C. § 14136e.

[27] The facts in this section are drawn from Anne C. Mulkern, et al., *Wrongly Convicted Man Is Free At Last*, Orange County Register (Cal.), June 21, 1996, at A1; H.G. Reza & Rene Lynch, *Freed O.C. Man Goes Home To Tearful Reunion*, L.A. Times, June 23, 1996, at A1; *Falsely Accused*, Forensic Examiner, Sept. 22, 2007, at 82.

Parker, and Green was released after serving more than seventeen years in prison.

2. Anthony Robinson

In 1987, Anthony Robinson, a 27-year-old former Army officer with a college degree in sociology, was convicted in Texas of aggravated sexual assault and sentenced to twenty-seven years' imprisonment.[28] The victim was assaulted in a campus restroom; Robinson was apprehended nearby and immediately identified by the victim. A jury convicted Robinson and the Texas Court of Appeals affirmed, commenting that the record contained "overwhelming evidence of appellant's guilt." *Robinson* v. *State*, No. C14-87-00345-CR, 1989 WL 102335, at *7 (Tex. Ct. App. Sept. 7, 1989).

Although his initial request for DNA testing was denied, prosecutors consented to testing in 2000, and the results excluded Robinson as the attacker. Robinson went on to earn a law degree from the Thurgood Marshall Law School at Texas Southern University.[29]

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[28] The facts in this section are drawn from *Robinson* v. *State*, No. C14-87-00345-CR, 1989 WL 102335, at *1 (Tex. Ct. App. Sept. 7, 1989); Melissa Fletcher Stoeltje, *Fight For Freedom*, San Antonio Express-News, Feb. 15, 2004, at 1K; Frontline, *Burden Of Innocence: Anthony Robinson*, May 1, 2003 (updated Aug. 2006), <tinyurl.com/anthonyrobinson>.

[29] A similar exoneration after an at-the-scene identification occurred in the case of Eduardo Velasquez. Velasquez was convicted based on the victim's identification and testimony that blood-typing of semen evidence revealed that he, along with 11 percent of the Hispanic population, could have been the source. Like Respondent, Velasquez instructed his attorneys to seek DNA testing, but his attorneys disregarded his instructions.

* * *

These accounts demonstrate that DNA testing has the power to exonerate individuals who were convicted based on evidence that appeared to be overwhelming. Were any of amici in Respondent's place—denied access to evidence by prosecutors and with no meaningful state judicial avenue available—their convictions would still stand today. Likewise, had their requests for access to DNA evidence been judged against the standard Petitioners urge, they would not have qualified for relief.

II. THE COURT SHOULD RECOGNIZE A CONSTITUTIONAL RIGHT NOT TO BE INCARCERATED OR EXECUTED IF ACTUALLY INNOCENT

This Court has never definitively resolved whether the continued incarceration of an individual who presents truly persuasive new evidence of actual innocence violates the Constitution. Amici agree with Respondent (Br. 30-31) that recognizing a constitutional right of post-conviction access to DNA evidence does not require resolution of that question. Nevertheless, recognizing a right of access may one day bring before this Court a habeas petition asserting such

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Velasquez's first petition for post-conviction access to DNA evidence was denied on the ground that the instructions he gave to his attorneys demonstrated that the evidence had been available at trial. *See* Brief and Record Appendix for Defendant [Eduardo Velasquez, f/k/a Angel Hernandez] on Appeal from Denial of a Motion for Access to Evidence for Purpose of DNA Testing, *Commonwealth* v. *Hernandez*, No. 99-P-1288 (Mass. App. Ct. Sept. 10, 1999). He was exonerated when a different court later ordered testing. *See* Pamela H. Sacks, *A Study In Contrasts*, Worcester Telegram & Gazette, May 14, 2002, at C1.

a "freestanding" claim of actual innocence based upon highly probative DNA evidence. When confronted with such a case, the Court should decide what it has already assumed, *see Herrera* v. *Collins*, 506 U.S. 390, 417 (1993), and hold that executing or continuing to punish one who has demonstrated his innocence is unconstitutional. *See Harvey* v. *Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[I]t would be a high credit to our system of justice that it recognizes the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science.").

A. A Freestanding Actual Innocence Right Is Guaranteed By Both The Due Process Clause And The Eighth Amendment

Six Justices in *Herrera* recognized a constitutional right not to be executed upon compelling proof of actual innocence. 506 U.S. at 419 (O'Connor, J., joined by Kennedy, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *id.* at 429 (White, J., concurring in the judgment) ("[A] persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); *id.* at 435 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting) ("Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent." (citations omitted)). The majority

opinion in *Herrera* assumed *arguendo* that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." 506 U.S. at 417; *see also House* v. *Bell*, 547 U.S. 518, 554-55 (2006); *Schlup* v. *Delo*, 513 U.S. 298, 315 n.31 (1995). Although *Herrera* involved an individual facing execution, "the principle at stake is no different for one who has been sentenced not to death, but to a term of extended incarceration." *Harvey*, 285 F.3d at 304-05 (Luttig, J., respecting the denial of rehearing en banc); *see also Herrera*, 506 U.S. at 405 ("It would be a rather strange jurisprudence . . . which held that under our Constitution [a petitioner demonstrating actual innocence] could not be executed, but that he could spend the rest of his life in prison.").

The fundamental right assumed to exist in *Herrera* has two independent sources in the Constitution. Once a prisoner has made a truly persuasive showing of actual innocence, the Due Process Clause demands that the government no longer deprive him of his liberty, and the Eighth Amendment demands that the government no longer punish him. The right these Amendments secure should be cognizable on habeas review as a freestanding actual innocence claim.

1. Executing or continuing to incarcerate a prisoner who makes a truly persuasive showing of actual innocence violates substantive due process

The Due Process Clause protects an individual "against arbitrary action of government," *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998) (internal quotations marks omitted), and forbids any abuse of executive power that "'shocks the conscience,'" *see id.* at 846 (quoting *Rochin* v. *California*, 342 U.S. 165, 172

(1952)). Holding fast to the distinction between legal guilt and factual innocence in the face of a truly persuasive showing of actual innocence would be the acme of arbitrary and unjust government conduct. *Cf. Herrera*, 506 U.S. at 398 ("After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent."). Indeed, few things could be more shocking to the conscience, or more destructive of rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), than continuing to punish someone who has made such a showing.[30]

Thus far, however, the Court has only assumed, without deciding, that a petitioner's freestanding actual innocence claim is cognizable under 28 U.S.C. § 2254. *See Herrera*, 506 U.S. at 417. The Court's reluctance to decide the issue in *Herrera* stemmed in part from doubts that such a "truly persuasive" showing would ever be made in federal court, *see id.* at 427 (O'Connor, J., concurring) (concluding that issue "may never require resolution at all"); *id.* at 428 (Scalia, J., concurring) ("With any luck, we shall avoid ever having to face this embarrassing question again[.]"), and in part from its conclusion that such a showing had not been made in that case, *see id.* at 417-19. As the submissions in this case make clear, however, modern

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[30] The presumptively innocent and presumptively guilty alike have a substantive due process right to be free from arbitrary incarceration, though the person who has been convicted must meet a much higher standard to vindicate that right. *See Harvey*, 285 F.3d at 313 (Luttig, J., respecting the denial of rehearing en banc) (observing that after conviction, a person's liberty interests are "residual and considerably reduced . . . from those existing pre conviction"); *infra* Part II.B (proposing standard of adjudication).

DNA analysis *does* enable a prisoner to make a truly persuasive showing of actual innocence. *See* Cert. Reply 8-9 (Petitioners' concession that a favorable DNA test result would completely exculpate Respondent); *supra* Part I. Nor does a truly persuasive showing of actual innocence necessarily result in an executive pardon. *See Herrera*, 506 U.S. at 413 ("'A pardon is an act of grace[.]'" (quoting *United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833))). Scientific advances have cleared away the doubts expressed in *Herrera*. *See infra* Part II.C. Should the Court be called upon to recognize the right it assumed in that case, it should hold that the continued detention of a person who has made a truly persuasive showing of actual innocence shocks the conscience and thus violates the Due Process Clause.[31]

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[31] The *Herrera* majority appears to have analyzed the freestanding innocence claim as a procedural due process right, *see Herrera*, 506 U.S. at 407 n.6, perhaps because Herrera was "imprecise in describing the sort of federal relief to which a suitable showing of actual innocence would entitle him," *id.* at 402. The majority construed his petition as a challenge to Texas's thirty-day limit on motions for a new trial, *see id.* at 406-07, 411, which is appropriately analyzed under the rubric of procedural due process. Amici, by contrast, do not suggest that any particular state procedure is the locus of the constitutional error; rather, they assert that a government that continues to detain a person who has persuasively demonstrated innocence violates the Constitution.

The same result follows if the Court analyzes the claim in terms of procedural due process. Continued incarceration of an individual who makes the requisite "extraordinarily high" showing of actual innocence offends a "fundamental" "principle of justice . . . rooted in the traditions and conscience of our people." *See id.* at 407-08 (quoting *Medina* v. *California*, 505 U.S. 437, 445-46 (1992)). That principle is simply the one identified in Justice Harlan's

2. Executing or continuing to incarcerate a prisoner who makes a truly persuasive showing of actual innocence constitutes cruel and unusual punishment

The right of a prisoner who has presented truly persuasive evidence of actual innocence not to be executed or detained is firmly grounded in established Eighth Amendment principles. The Amendment's protections extend to questions of guilt or innocence, *see Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) (applying Eighth Amendment to "rules that diminish the reliability of the guilt determination"), and do not cease upon conviction and sentencing, *see Johnson* v. *Mississippi*, 486 U.S. 578, 584-85 (1988); *Ford* v. *Wainwright*, 477 U.S. 399, 410 (1986) (plurality opinion). The Amendment is centrally concerned with the relationship between the offense and the punishment—not simply consideration of whether, in the abstract, a certain type or duration of punishment is cruel and unusual. *See Robinson* v. *California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

A truly persuasive showing of actual innocence based on new evidence fundamentally erodes the result of even a constitutionally perfect trial, the foundation of the state's power to punish. Such a showing of actual innocence rebuts the presumption of guilt that attaches upon conviction following a fair trial, *see Herrera*, 506 U.S. at 399, and severs the legal connection between the guilty verdict and the punishment. And without a

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concurrence in *In re Winship*, 397 U.S. 358, 372 (1970): "[I]t is far worse to convict an innocent man than to let a guilty man go free."

legitimate reason to punish, any punishment is inherently cruel and unusual. *See id.* at 431 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting).

B. A "Modified-*Jackson*" Standard Strikes The Proper Balance Between Prisoners' Rights And Concerns Of Finality, Comity, And Conservation Of Judicial Resources

To prevail on a freestanding actual innocence claim, the showing of "truly persuasive" evidence, *see Herrera*, 506 U.S. at 417, must be "extraordinarily high" and "requires more convincing proof of innocence than *Schlup*." *See House*, 547 U.S. at 555. In *Schlup*, the Court held that for a habeas petitioner to overcome a procedural bar by showing that "'a constitutional violation has probably resulted in the conviction of one who is probably innocent,' ... the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." 513 U.S. at 327 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986)). The standard is higher than that required to establish prejudice, *see id.* at 327, but lower than the "extraordinarily high" standard for prevailing on a freestanding claim of actual innocence, *see House*, 547 U.S. at 555.

Amici submit that a petitioner satisfies this "extraordinarily high" standard when he shows that, "based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact [w]ould [find] proof of guilt beyond a reasonable doubt.'" *Herrera*, 506 U.S. at 429 (White, J., concurring in judgment) (quoting *Jackson* v.

Virginia, 443 U.S. 307, 324 (1979)).[32] In *Jackson*, the Court reasoned that because conviction is unjust except upon sufficient proof, a conviction would be unconstitutional if no rational juror could have concluded that the proof adduced at trial was sufficient to find the defendant guilty beyond a reasonable doubt. *See* 443 U.S. at 316-17. A slightly modified version of the standard set forth in *Jackson*—changing the word "could" to "would" to reflect the forward-looking nature of the inquiry—is appropriate for determining whether to grant relief to a petitioner presenting a freestanding actual innocence claim. Like a *Jackson* claim, a freestanding actual innocence claim requires a legal conclusion as to what a rational juror would decide based on all of the evidence, *see id.* at 319, not, as with the *Schlup* inquiry, "'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329). The standard affords the outcome of a constitutionally-conducted trial the tremendous weight to which it is entitled, yet recognizes the principle, embodied in the Fourteenth and Eighth Amendments, that a just government can no longer detain a prisoner who has demonstrated his innocence with truly persuasive new evidence. *See Harvey*, 285 F.3d at 306 (Luttig, J., respecting the denial of hearing en banc)

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[32] As when a habeas court considers actual innocence in the context of a *Schlup* claim, the court "must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" 513 U.S. at 328 (quoting Henry J. Friendly, *Is Innocence Irrelevant?*, 38 U. Chi. L. Rev. 142, 160 (1970)).

(concluding that categorically denying the existence of a freestanding actual innocence claim would "confer a sanctity upon finality that not even that concededly substantial interest deserves").

C. Recent Experience With DNA Evidence Addresses Many Of The Concerns Expressed In *Herrera*

In *Herrera*, the majority voiced concern that recognizing a freestanding claim of actual innocence would be "disruptive of our federal system," 506 U.S. at 401, and would saddle state courts with an "enormous burden" of conducting costly and inconclusive new trials, *see id.* at 417. Underlying these concerns was the premise that newly-discovered evidence, by its nature, lacks the probative power necessary to meet the "extraordinarily high" standard that the Court envisioned for freestanding actual innocence claims. *Id.* at 417; *see id.* at 403 ("[T]he passage of time only diminishes the reliability of criminal adjudications."); *id.* at 405 ("[I]t is far from clear that a second trial 10 years after the first trial would produce a more reliable result."); *id.* at 406 ("[T]he question of guilt or innocence . . . becomes more uncertain with time for evidentiary reasons."). Since *Herrera* was decided, however, advances in DNA analysis have made possible "the generation of evidence qualitatively like no other previously known." *Harvey*, 285 F.3d at 305 (Luttig, J., respecting the denial of rehearing en banc). We now know that biological evidence—usually hair, blood, or semen—can be subjected to STR DNA testing that, to a practical certainty, confirms or eliminates the prisoner as its source. *See* Resp. Br. 4. Moreover, criminalists and courts have amassed sufficient experience with STR DNA techniques to avoid the

need to "'make a case-by-case determination about the reliability of the newly-discovered evidence under the circumstances.'" *Herrera*, 506 U.S. at 403 (quoting *id.* at 443 (Blackmun, J., dissenting)).

The proposed standard of adjudication ensures that freestanding innocence claims would burden neither state nor federal courts because the vast majority of cases lack the type of evidence that could meet the standard. *See* Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1709 (2008) (observing that "criminal cases do not often both have identity as a disputed issue and also involve relevant biological evidence"). The availability of other mechanisms for relief, although not eliminating the need for habeas review in the extraordinary case, significantly reduces the number of actual innocence claims that reach the federal courts. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 94 (2008) (reporting that, of 133 exonerees in study for whom written decisions exist, only twenty-three percent filed federal habeas petitions).[33] Nor is there any doubt that, when the rare case arises, courts can easily distinguish between claims based on STR DNA testing or similarly persuasive evidence and claims based on less conclusive evidence, as this Court has itself demonstrated. *Compare Herrera*, 506 U.S. at 418-19 (analyzing affidavits in light of evidence offered at trial and finding them insufficient to satisfy any possible standard of review), *with House*, 547 U.S. at

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[33] Of course, a prisoner must exhaust available state remedies before filing a federal habeas petition asserting a freestanding actual innocence claim. *See* 28 U.S.C. § 2254(b).

540-54 (analyzing DNA and other evidence and finding *Schlup* gateway standard satisfied).

The question of factual innocence has been a subject of inquiry in federal habeas cases for over twenty years. *See Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion) (federal courts must entertain successive petition "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"); *Carrier*, 477 U.S. at 496 ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default[.]"); *Smith* v. *Murray*, 477 U.S. 527, 537 (1986) (same). In light of this long experience examining factual innocence, as well as more recent experience with STR DNA testing, the Court may be confident that a freestanding actual innocence claim, subject to the appropriately high standard of adjudication, would properly vindicate constitutional rights without being disruptive or burdensome.

III. A Suit Seeking Post-Conviction Access To Evidence For DNA Testing Is Cognizable Under Section 1983

Petitioners assert that an access-to-evidence suit like Respondent's is not cognizable under Section 1983, arguing that, under *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), and *Heck* v. *Humphrey*, 512 U.S. 477 (1994), it may be brought only in habeas. *See* Pet. Br. 18-35. In fact, under *Preiser*, *Heck*, and their progeny, Respondent's claim for access to evidence is clearly cognizable under Section 1983, and Petitioners' argument to the contrary would become no more plausible if this Court were to recognize a freestanding

cause of action based on a demonstration of actual innocence.

A. The Rule Of *Heck* v. *Humphrey* Does Not Bar A Section 1983 Suit Seeking Access To Evidence

Section 1983 provides a cause of action for anyone subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of state law. 42 U.S.C. § 1983. A habeas corpus suit typically also alleges that a state actor—the prisoner's custodian—is causing a deprivation of rights by subjecting the prisoner to continued incarceration in violation of the Constitution. *See* 28 U.S.C. § 2254(a). Consequently, most habeas corpus challenges will also, prima facie, state a claim under Section 1983. Habeas corpus, however, is subject to familiar preconditions and limitations—including exhaustion of state remedies—that do not apply to Section 1983. Reasoning that prisoners with habeas corpus challenges could circumvent these restrictions by styling their suits as Section 1983 actions, this Court announced an implicit exception to Section 1983 in *Preiser*. It held that the prisoners' claims in that case—alleging "illegal physical confinement" and requesting relief that would result in "release from physical custody"—could be brought only in habeas. *Preiser*, 411 U.S. at 487, 500.

In *Heck*, the Court further developed the test for distinguishing cases that must be brought in habeas from those permitted under Section 1983. The prisoner in *Heck* sued prosecutors and a police investigator for damages while his state-court conviction was still pending on direct appeal, alleging unconstitutional actions in the investigation and trial of his case. 512

U.S. at 478-79. This Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487. To illustrate, the Court noted that a claim seeking damages for an allegedly unreasonable search and seizure may be brought under Section 1983 because, in light of "doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.* at 487 n.7 (citations omitted).

By its plain terms, *Heck* does not rule out Respondent's Section 1983 action. He alleges a constitutional right to gain access to potentially-exculpatory evidence, *not* a constitutional right to be released from prison simply because the government refuses to turn over the evidence. Thus, his claim does not seek "a determination that he is entitled to immediate release or a speedier release." *Preiser*, 411 U.S. at 500. Nor would a judgment in his favor "necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487; *see also Wilkinson* v. *Dotson*, 544 U.S. 74, 78 (2005) (rejecting state's contention that Section 1983 plaintiff's hopes or purpose of securing earlier release renders the suit *Heck*-barred); *Nelson* v. *Campbell*, 541 U.S. 637, 647 (2004) ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'"). On the contrary, a judgment in his favor would result only in the government's releasing evidence for DNA

testing—and the results of that testing could be exculpatory, inculpatory, or inconclusive. Because winning such a judgment would not necessarily imply the invalidity of Respondent's conviction or sentence, his suit is cognizable under Section 1983.

B. Recognizing A Freestanding Innocence Claim Does Not Alter The *Heck* Analysis

Petitioners maintain (at 19, 26-28) that Respondent's suit seeking access to evidence is an "artful[ly] plead[ed]" version of an entirely different suit: one asserting a constitutional right not to be incarcerated on account of actual innocence, and seeking access to evidence for DNA testing as discovery in that suit. But this mistakes the constitutional violation Respondent alleges. He claims that the refusal to turn over evidence, not the fact of his incarceration, is unconstitutional. *See* Resp. Br. 22. For the reasons just discussed and those set out in Respondent's brief, *see id.* at 18-25, *Heck* does not require such an access-to-evidence claim to be brought in habeas. Moreover, if and when this Court recognizes a freestanding claim of actual innocence, that analysis will not change. *Heck* requires a court to determine whether success in the action *actually before the court* necessarily would imply the invalidity of the prisoner's conviction or sentence. *See McKithen* v. *Brown*, 481 F.3d 89, 102 (2d Cir. 2007) ("[T]he test is whether success in the § 1983 suit *sub judice* will necessarily demonstrate the invalidity of a conviction or sentence[,] and not whether a plaintiff *intends* to bring subsequent challenges[.]"). A suit that will result only in the release of biological material for testing—testing that might or might not yield persuasive evidence of

innocence—will not necessarily imply invalidity, whatever subsequent avenues for relief might exist.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF JEANETTE POPP, JENNIFER THOMPSON-CANNINO, MELINDA ELKINS, TRACY KANELLOPOULOS, STACY FIERGE, MICHELE MALLIN, AND MARK TOKARSKI IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

Amici are individual crime victims or family members of crime victims whose lives have been profoundly impacted not only by the crimes perpetrated against them or their loved ones, but by the results of post-conviction DNA testing. Because the interests of other people impacted by crime are likely to be affected by the resolution of this case, *amici* submit this brief to offer this Court a view of the ways in which post-conviction DNA analysis serves and supports victims' rights.

SUMMARY OF ARGUMENT

The federal government and all fifty states have passed legislation recognizing the rights of crime victims. This Court has likewise recognized that the finality of convictions is part of the moral dimension of the criminal law that is shared by victims and the state. Underlying that moral dimension is the bedrock principle that innocent defendants should not be punished for crimes they did not commit.

Neither the government nor the victims of crime have any interest in punishing the innocent. DNA testing is a revolutionary truth-seeking tool with the power to determine innocence or guilt and to provide victims, defendants, and society with finality. *Amici* have all suffered in some way at the hands of

[1] The parties have consented to the filing of amicus briefs in this case and filed consent letters with the Clerk. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

criminals, but they have also experienced the power of post-conviction DNA testing to rebalance the scales of justice.

The stories of *amici* provide a tapestry of the real-life experiences of victims and defendants who have been impacted by post-conviction DNA testing. It is against this human backdrop not in the realm of the hypothetical that the core issues of finality, truth, and justice should be evaluated in this case.

ARGUMENT

I. DNA Testing Provides A Gold Standard For Victims to Know That The Moral Judgment Of A Criminal Conviction Has Been Meted Out On The Guilty Party.

All fifty states and the federal government have enacted some form of victims' rights legislation. *See* Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) (listing victims' rights statutes). Thirty-two states have ensconced victims' rights in their constitutions. *Id.* at 527 n.14. While the exact contours of these provisions differ, they represent a fundamental recognition of the role of the crime victim in the criminal justice system. Although none of these laws specifically provides crime victims with the right to have post-conviction DNA testing conducted, such testing is consistent with the rights of crime victims, including their right to be protected from further harm from the persons who actually victimized them, and their right to be treated with fairness and respect for their personal dignity.

This Court has noted that the finality of criminal proceedings has a "moral dimension" that is

often shared by the state and the victims of crime. *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). "Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty[.]'" *Id.* (internal citations omitted).

Satisfying this moral interest depends on a fundamental, yet simple condition that the defendant who is punished is not factually innocent of the crime charged. "[N]o one, regardless of his political, philosophical, or jurisprudential disposition, should otherwise be troubled that a person who was convicted in accordance with law might thereafter be set free, either by the executive or by the courts, because of evidence that provides absolute proof that he did not in fact commit the crime for which he was convicted." *Harvey v. Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). Neither the state nor the victims of crime can claim any legitimate interest in inflicting punishment on factually-innocent persons. *Cf. Herrera v. Collins*, 506 U.S. 390, 417 (1993) (recognizing "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional"); *id.* at 420 (same) (O'Connor, J., concurring).

Twenty years ago, a New York Court recognized that "[DNA testing] constitute[s] the single greatest advance in the 'search for truth,' and the goal of convicting the guilty and acquitting the innocent,

since the advent of cross-examination." *People v. Wesley*, 533 N.Y.S. 2d 643, 644 (Albany County Ct. 1988). The state of the art has made significant progress in the last two decades. It allows an effectively unique profile to be generated from even the smallest and most degraded of samples. This technology is different from all that preceded it, in that it is capable of discerning the essential facts to "a practical certainty." *Harvey*, 285 F.3d at 305 & n.1 (Luttig, J., respecting the denial of rehearing en banc). Victims of crime should be entitled to the greatest degree of certainty that society can muster.

II. The Experiences Of *Amici* Demonstrate The Power of Post-Conviction DNA Testing To Ensure That Justice Is Served And To Provide Crime Victims With Closure And Finality.

Victims of crime have a profound interest that those being punished are actually guilty of the crimes for which they were convicted. The life experiences of *amici* demonstrate the salience of this point.

Melinda Elkins saw her husband spend seven years in prison after he was wrongfully convicted of the rape and murder of her mother and the rape of her niece.

Tracy Kanellopoulos was raped by a man with a history of rape who remained at large because an innocent man was wrongly convicted for his crimes.

Jennifer Thompson-Cannino twice testified against an innocent man she was convinced had raped her. She was victimized not only by the crime against her, but by her own guilt when she learned that she had misidentified her assailant.

Jeanette Popp thought the men who raped and murdered her daughter had been tried, convicted, and sent to prison. She suffered through the experience of the murder trial, believing justice had been done, only to have her world turned upside down when the real killer was found.

Stacy Fierge identified the man she believed had raped her. He was convicted and sent to prison. Although the defendant claimed he was the victim of mistaken identity, post-conviction DNA testing ultimately confirmed that justice had been done.

In the first four examples profiled in this brief, post-conviction DNA testing led to the exoneration of a falsely convicted individual and to the discovery of the true perpetrator. In some cases the DNA testing vindicated a long-held belief in truth that was denied by the justice system, while in others the DNA testing overturned long-held beliefs that the right person or persons were being held to account for the crimes. In Ms. Fierge's case, post-conviction DNA testing confirmed that the right person had been convicted and laid to rest any doubt about mistaken identity.

Amici Michele Mallin and Mark Tokarski are also victims or family members of victims of violent crimes that led to the conviction of innocent persons who were ultimately exonerated by DNA testing. Although the guilty have not yet been brought to justice in these cases, DNA testing affords *amici* their best hope that moral justice will be properly brought to bear.

Victims deserve to participate in the criminal justice system confident that it will correct "fundamental miscarriage[s] of justice," *see Engle v.*

Isaac, 456 U.S. 107, 135 (1982), thus "guaranteeing that the ends of justice will be served in full." *McCleskey v. Zant*, 499 U.S. 467, 495 (1991).

Each of these interests is fostered by the recognition of a fundamental due process right to post-conviction access to biological evidence for testing. And indeed, even when that evidence does not establish the convicted defendant's innocence or perhaps especially in those cases DNA testing provides a gold standard for victims to know that the moral judgment inflicted by society's punishment will be carried out on the correct person. This moral concern takes on an added dimension of finality in capital cases.

With the foregoing in mind, we set forth the personal stories of *amici* to illustrate the shared interest of crime victims in using post-conviction DNA testing to secure justice and true finality in their cases.

A. Melinda Elkins: *Endured Her Husband's False Conviction For The Rape And Murder Of Her Mother And The Rape Of Her Niece.*

On June 7, 1998, an assailant entered Judy Johnson's home in Barberton, Ohio.[2] He savagely beat her, raped her and strangled her to death. He also raped and beat her six-year-old granddaughter, Brooke Sutton,[3] whom Ms. Johnson was babysitting. The assailant left Brooke for dead. Brooke told her mother that she recognized her attacker as her uncle, Clarence Elkins. Mr. Elkins was arrested.

Brooke's aunt, *amicus* Melinda Elkins, is the daughter of the murder victim and the wife of the accused. Ms. Elkins was certain of her husband's innocence and determined to find her mother's real killer. At her mother's graveside, Ms. Elkins made a promise: "Mom, I will fight for the rest of my life to figure this out and to find out who did this to you."

[2] Ms. Elkins's story received extensive coverage in the media. *See, e.g., Dateline NBC: Killer Instinct; Melinda Elkins Works Seven Years to Prove Her Husband's Innocence in Murder of Her Mother, Judy Johnson, and Rape of Her Niece, Brooke Sutton* (NBC television broadcast June 3, 2007).

[3] Brooke Sutton is now sixteen years old. She has previously consented, both personally and through her guardian, to the use of her full name and picture in various news accounts. She has also appeared, using her full name on television. For these reasons, *amici* forgo the common practice of referring to a child victim with a pseudonym.

Mr. Elkins had alibi witnesses who could account for his whereabouts throughout the night of the attack. Moreover, the state conceded that there was no physical evidence connecting Mr. Elkins to the crime. Although biological evidence was collected from the crime scene and the victims' bodies, none of it matched Mr. Elkins. For example, mitochondrial DNA testing was conducted before trial on pubic hairs found on each of the victims' bodies. The tests ruled out Mr. Elkins as the source of the hairs.

Despite the absence of physical evidence linking him to the crimes, Mr. Elkins was convicted of murder, aggravated assault, and three counts of rape primarily on the strength of Brooke's eyewitness identification. He was sentenced to life in prison.

Ms. Elkins eventually convinced prosecutors to release the DNA evidence to her for testing. Improvements in technology since 1998 allowed testing of evidence taken directly from Ms. Johnson's body and from Brooke's underwear. This more sensitive testing revealed additional DNA present in skin cells collected at the scene. The DNA did not match Mr. Elkins. Nevertheless, the court denied a motion for a retrial.

Shortly thereafter, Ms. Elkins read about the rape conviction of Earl Eugene Mann, one of Ms. Johnson's former neighbors. In a twist of fate, Mann was imprisoned in the same cell block as Mr. Elkins. Aware of his wife's suspicions that Mann was the true killer and rapist, Mr. Elkins kept an eye on Mann and waited for an opportunity to gather a DNA sample. That opportunity came when he saw Mann drop a cigarette butt.

Tests on the cigarette butt showed that Mann's DNA matched the DNA recovered from both Ms. Johnson's body and from Brooke's underwear. Mr. Elkins was eventually exonerated and released from prison on December 12, 2005. At a television press conference given on learning of her husband's exoneration, Ms. Elkins prayed for her mother: "We got him, Mom. You can rest in peace now." She then looked to the camera and said: "And I'd like to say to Earl Mann: We got you."

Mann ultimately pled guilty to aggravated murder, attempted murder, aggravated burglary and rape in connection with his crimes. He was sentenced to fifty-five years to life in prison.

Had the technology been available in 1998, an innocent man may never have been convicted. And had the DNA evidence remained out of reach in 2005, the criminal justice system would have failed the victim of the crime not once, but twice. Not only would Mr. Elkins still be in prison, but Mann who raped at least three children *after* committing the rapes and murder in the Elkins case would soon be free.

B. Tracy Kanellopoulos: *Raped Because The Wrong Man Was Sent To Prison.*

On July 31, 1981, a man in a cowboy hat approached a car that sat idling in the parking lot of an Atlanta Kentucky Fried Chicken. The man brandished a pistol and said to the woman sitting in the driver's seat, "Slide over or I'll blow your brains out." The man entered the car and forced the woman to drive to a remote part of Cobb County, Georgia. He beat her severely, raped her three times, stole the car and left her for dead on the side of the road.

In her initial interview with the police, the victim described her abductor as five-feet-seven-inches tall. But in a later photo array and live line-up, she was "fairly positive" when she identified six-foot-one-inch tall Robert Clark. At Clark's trial, the victim testified that "I will never forget the face, the skin color and his voice." Clark was convicted of rape, abduction, and armed robbery and sentenced to two life terms plus twenty years in prison.[4]

But Clark did not commit any of those crimes. Twenty-four years later, DNA testing cleared Clark, and implicated Floyd Antonio Arnold. While Clark was serving a twenty-five year sentence for Arnold's crimes, Arnold committed numerous other crimes. Among those crimes was the rape of *amicus* Tracy Kanellopoulos in Fulton County, Georgia in 1993. Arnold committed another rape in DeKalb County in 1996. Both rapes were "cold cases" that were ultimately solved because of Clark's efforts to secure DNA evidence to prove his innocence.

Had the DNA evidence been available and tested in 1981, Arnold likely would have been caught and imprisoned before he committed his other crimes. An innocent man would not have gone to

[4] This case was covered extensively in the news media. *See, e.g.*, Don Plummer, *A Free Man; Robert Clark Spent Nearly 25 Years Behind Bars for a Rape He Didn't Commit. He Knew He Was Innocent, and Now the Rest of the World Knows It, Too*, Atlanta J. Const., Dec. 9, 2005 at 1A; Bill Tropy & Bill Rankin, *A Crime, then a Tragedy; Twists in Rape Case Snared Wrong Man*, Atlanta J. Const., Dec. 11, 2005 at 1A.

prison. And Ms. Kanellopoulos would not have been raped.

C. Jeanette Popp: *Watched Two Innocent Men Go To Prison For Her Daughter's Rape and Murder.*

On October 24, 1988, in Austin, Texas, Nancy DePriest was raped and murdered at the Pizza Hut where she worked.[5] She was twenty years old. A couple of weeks later, Christopher Ochoa and Richard Danziger (who worked at another area Pizza Hut) visited the restaurant where DePriest had been murdered. Danziger proposed a toast to DePriest and discussed the killing with a security guard. Pizza Hut employees alerted police, who approached Ochoa at work two days later. Ochoa willingly accompanied them to the police station.

After two days of interrogation and threats, and with the assistance of detectives, Ochoa gave a false confession. He admitted entering the Pizza Hut with Danziger, binding Ms. DePriest, and repeatedly raping her. Ochoa initially claimed that Danziger killed her but, after a polygraph test, Ochoa changed his story and claimed that he was the shooter.

Ochoa pled guilty and avoided the death penalty in return for his testimony against Danziger. His confession was corroborated by DNA tests linking semen collected from the crime with a Hispanic perpetrator. Ochoa testified and described the killing

[5] This case has been the subject of numerous news articles. *See, e.g.*, Jason Shepard, *Finding Justice*, Isthmus, May 12, 2006, at 13; Mark McDonald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002.

in grisly detail. The jury convicted Danziger and sentenced him to life in prison.

DePriest's mother, *amicus* Jeanette Popp, attended each day of Danziger's trial. After the conviction, she met with the jury and, as she put it: "I couldn't have thanked them any more for the justice they had given my child." Diane Jennings, *Mother of '88 Murder Victim Says Her Faith in Justice System Shattered after Exoneration*, Dallas Morning News, Feb. 24, 2008. She was certain that justice had been done, and "wouldn't have questioned the police or the prosecution . . . the evidence was so overwhelming, so overwhelming." *Id.*

As later events would demonstrate, however, the proceedings in the courtroom did not lead to justice for Ms. Popp, her daughter, or the defendants. Notwithstanding Ochoa's testimony, both Ochoa and Danziger were innocent of any involvement in the rape and murder of Ms. DePriest. In a further tragedy, not long after his conviction, Danziger was brutally attacked in prison. He survived, but lost part of his brain and is permanently disabled.

The real rapist and murderer was Achim Josef Marino, who had selected his victim at random as part of a satanic ritual. Marino who was later sentenced to two life terms in prison for robbery learned of Ochoa's and Danziger's story from a fellow inmate. In 1996, Marino wrote a letter to the police and to a newspaper confessing to the killing and informing them of the location of the handcuffs he had used. Two years later, Marino wrote to the district attorney's office and again confessed to Ms. DePriest's murder. Despite Marino's confession, Ochoa did not recant his prior testimony.

In 1999, however, Ochoa reached out to the Wisconsin Innocence Project, which located the DNA evidence from the 1988 crime scene. The district attorney's office tested the DNA and, in September 2000, notified Ochoa that the test results pointed to Marino as the culprit. In early 2001, both Ochoa and Danziger were released from prison.

Twelve years after her daughter's death, Ms. Popp was faced with the fact that the two men she thought had killed her daughter were innocent. She was understandably anguished that they had spent years in prison for a crime they did not commit yet relieved that DNA testing had finally revealed the truth. Ms. Popp met with Ochoa's mother and accompanied her to his release. Ms. Popp said that her "heart was just filled with joy" when he was freed from prison. She also met with Marino, who apologized to her, but refused her request that he plead guilty so that she would not have to go through another trial over her daughter's rape and murder. Marino was subsequently tried, convicted and sentenced to life in prison.

Speaking about Ochoa and Danziger, Ms. Popp explained that "I knew we had done a horrible thing. I say 'we' even though I was not involved in sending them to prison. I somehow feel responsible." Henry Weinstein, *Freed Man Gives Lessons on False Confessions*, L.A. Times, June 21, 2006. Those feelings of tremendous guilt would have been even further compounded had Ochoa or Danziger been executed.

While post-conviction DNA testing could not prevent the brutal crimes perpetrated on Ms. DePriest, it provided Ms. Popp with the finality of

knowing that her daughter's true murderer would never kill again, and that justice had been done.

D. Jennifer Thompson-Cannino: *Spent Eleven Years Believing That An Innocent Man Raped Her.*

In July 1984, *amicus* Jennifer Thompson-Cannino was raped in her Burlington, North Carolina home.[6] She was awakened around 3:00 A.M. by an intruder who held her captive. She was able to catch brief glimpses of the man and, throughout her ordeal, she made an effort to remember the details of his appearance so that she could later identify him. Ms. Thompson-Cannino eventually escaped from her captor and fled to a neighbor's house. Another woman in a nearby home was raped under similar circumstances that same night.

Ms. Thompson-Cannino was taken to the hospital, where biological evidence from the attack was collected. She was then taken to the police station to give a statement and to help police make a composite sketch of her assailant. She was confident that she could identify the man. Police set out a dragnet for a black male, with a light complexion, around six feet tall, 170 to 175 pounds with short hair and a thin moustache.

The police received a tip identifying a man named Ronald Cotton, who matched the physical description of the assailant. Cotton had been

[6] This case is the subject of an in-depth PBS *Frontline* program and web site. *See Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997).

convicted as a teen for attempted rape and was on parole for breaking and entering. Police had Ms. Thompson-Cannino review a set of mug shots and she identified Cotton as her assailant.

When Cotton learned that he was being sought, he voluntarily went to the police station. He was put in a police line-up with six other men. Ms. Thompson-Cannino again selected him as her assailant. She was certain Cotton was the man.

The case against Cotton went to trial in January 1985, with little physical evidence. Blood typing of the semen sample collected that night was inconclusive. In addition, the trial judge excluded evidence that the other rape victim (who had been raped the same night as Ms. Thompson-Cannino) did not identify Cotton as her assailant. On the weight of Ms. Thompson-Cannino's testimony, Cotton was convicted and sent to prison.

On September 30, 1986, Cotton wrote his lawyer from prison because he was certain he had met the man who actually committed the rapes. That man was Bobby Poole. Poole worked with Cotton in the prison kitchen and shared a dorm with him. Soon thereafter, Cotton was granted a new trial on the basis of the excluded evidence about the second rape.

At the preliminary hearing, Poole testified and denied involvement in the crimes. Despite seeing Poole at the hearing, Ms. Thompson-Cannino remained steadfast in her belief that Cotton was her assailant. Moreover, the second rape victim changed her mind and also identified Cotton as her assailant. No evidence about Poole was presented at the second trial. Cotton was convicted of both rapes.

Ms. Thompson-Cannino celebrated Cotton's conviction. She said at the time: "I hated him worse than I hated anything in my whole life." She prayed that Cotton would be raped and killed in prison. Ruben Rosario, *'Sequential Lineups' Help Police Find the Right Suspect*, Saint Paul Pioneer Press (Minnesota), Feb. 11, 2005, at B1.

In 1995, prompted by inquiries from law professor Rich Rosen, the police and prosecutor raised the issue of DNA testing with Ms. Thompson-Cannino, who "agreed [to the tests] because [she] knew that Ronald Cotton had raped [her] and DNA was only going to confirm that. The test would allow [her] to move on once and for all." Jennifer Thompson, Editorial, *"I Was Certain, but I Was Wrong,"* N.Y. Times, June 18, 2000. Despite policies that allow for the destruction of old DNA samples spurred by an intuition that there may be some issues in the future involving DNA the police had kept evidence from the case.

The DNA tests exonerated Cotton and proved that Poole was the rapist in both of the 1984 rapes. This was a stunning turn of events for Ms. Thompson-Cannino, who "will never forget the day [she] learned . . . [that] the man [she] had identified so emphatically on so many occasions was absolutely innocent." *"I Was Certain, but I Was Wrong,"* N.Y. Times, June 18, 2000. This revelation, together with her role in the false conviction, led Ms. Thompson-Cannino to work as a speaker and advocate on the inherent unreliability of eyewitness identifications.

If the police had not opted to save the DNA, and if Cotton had never obtained access to post-conviction DNA testing, Ms. Thompson-Cannino

might have spent the rest of her life consumed with the hatred of a man who never hurt her, while the man who raped her would have gone unpunished for his crime. Her mistaken identification would have been the cause however inadvertent of a profound miscarriage of justice. Fortunately, she now has peace of mind knowing that, in the end, justice was done.

E. Stacy Fierge: *Verified That Justice Had Been Done.*

On the evening of October 12, 1997, *amicus* Stacy Fierge returned home to her apartment in rural Missouri. She was met there by a man with a pillowcase over his head, holding a knife. He taped a pillowcase over Ms. Fierge's head and raped her twice. Police were able to gather blood from her clothes and semen from a rape kit taken at the hospital. Ms. Fierge told police that her attacker was black and around 5'8" tall.

Police suspected that the ex-husband of one of Ms. Fierge's neighbors could be the assailant. The man matched the physical description and had visited his ex-wife on the night of the attack. Police recorded his voice and Ms. Fierge identified the voice as that of her assailant. The relatively rudimentary blood and semen testing performed at the time suggested that the semen and some blood had come from her neighbor's ex-husband.

Circumstantial evidence also pointed to the ex-husband as the attacker. He had left his wife's apartment with a putty knife and screwdriver, ostensibly to help a neighbor with some handy work, but more likely to pry open Ms. Fierge's window. He also seemed to have knowledge of the crime before

police approached him. The defendant was tried and convicted. His defense at trial was based on mistaken identity.

The defendant eventually sought access to his DNA to prove his claim of innocence. The prosecutor consented to the testing. When Ms. Fierge learned of the attempts to perform post-conviction DNA tests on the evidence from her rape, she contacted the defendant's attorney and informed counsel that she was certain that she had identified the correct assailant. Ms. Fierge agreed that the DNA testing should go forward, however, because the results could prove the defendant's guilt or innocence to a scientific certainty, which was in everyone's best interest.

The DNA testing proved conclusively that the man Ms. Fierge had identified was indeed the rapist. Ms. Fierge, like Ms. Thompson-Cannino, had been certain of the identity of her rapist. Here, that belief was ultimately vindicated by post-conviction DNA testing, which further laid to rest the defendant's false claims of mistaken identity.

* * *

The tragic experiences profiled above illustrate the tremendous truth-finding power of post-conviction DNA testing. While in each of the examples above, the actual perpetrator was found, that is not always the case. Indeed, the victimizers of the other *amici* named in this brief have not yet been brought to justice. Nevertheless, post-conviction DNA analysis is still of great importance to victims even when exoneration results in an unsolved crime.

Amicus Michele Mallin misidentified Timothy Cole as her attacker. Cole died of an asthma attack

in prison in 1999, after serving thirteen years of a twenty-five-year sentence. DNA testing posthumously proved his actual innocence. Ms. Mallin now speaks out publicly on his behalf.

Amicus Mark Tokarski is the father of an eight-year-old girl who was raped by an intruder in 1987. Based on the young girl's identification and forensic hair science later proven to be erroneous, Jimmy Ray Bromgard was convicted and sentenced to forty years in prison. Post-conviction DNA testing proved Bromgard's innocence, and he was released in 2002, having served more than fourteen years in prison. Mr. Tokarski now speaks out publicly on behalf of the wrongly convicted.

CONCLUSION

Proof to a "moral certainty," *cf. Victor v. Nebraska*, 511 U.S. 1, 15–17 (1994), is imperfect; it admits a possibility of doubt. It "is not an indictment of our system of justice [that it] does not . . . require proof beyond *all* doubt, and therefore *is* capable of producing erroneous determinations of both guilt and innocence." *Harvey*, 285 F.3d at 306 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc) (emphasis in original).

But these errors have consequences. Just as there is a cost on society from wrongful acquittals, *see Patterson v. New York*, 432 U.S. 197, 208 (1977), there is likewise a cost from wrongful convictions. That cost is not paid only by the convicted; erroneous convictions also come at the cost of the victims of crime. Indeed, false convictions provide victims and society at large with false assurance that justice has been done. And when the innocent go to jail, the

guilty remain free. Indeed, the guilty often go on to create more victims by committing more crimes.

Early in the last century, Judge Learned Hand observed that "[o]ur procedure has been always haunted by the ghost of the innocent man convicted." *United States v. Garsson*, 291 F. 646, 649 (D.C.N.Y. 1923). Today, the availability of DNA testing provides a unique truth-finding tool in the service of both justice and finality. Recognition of a due process right to post-conviction access to DNA serves crime victims' interests both in obtaining protection from those who would harm them, and in seeing justice served on those who have. For these reasons, *amici* respectfully request that this Court affirm the ruling of the court below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF K.G. AND THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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IN THE

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No. 08-6

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

UNOPPOSED MOTION OF K.G. TO PROCEED BY USE OF HER INITIALS RATHER THAN THROUGH HER FULL NAME

The parties in this matter have each previously consented to K.G. filing an *amicus* brief in this case with the National Crime Victim Law Institute. K.G. is the crime victim in this case who was raped by respondent Osborne. K.G. now moves the Court to proceed through use of her initials rather than use of her full name to protect her privacy. The parties do not oppose this motion.

Because K.G. is a victim of rape, she has significant privacy interests at stake in this case. Indeed, the very focus of her *amicus* brief is the intrusion on

her privacy that will result if the Ninth Circuit's decision below is affirmed.

Because of the nature of the crime committed against K.G., the parties have already agreed to redact any reference to her full name in the Joint Appendix that is being prepared in this matter. Likewise, in proceedings below, the Ninth Circuit and the Alaska appellate court have referred to K.G. by her initials rather than by her full name. Indeed, the habeas petition that triggered this matter used initials as well.

This Court has allowed the use of pseudonyms or similar devices when significant privacy interests are at stake. *See, e.g, Doe v. Gonzales*, 546 U.S. 1301 (2005) (allowing petitioner to proceed as "John Doe" in case involving access to library records); *Roe v. Wade*, 410 U.S. 113 (1973) (women raising abortion rights allowed to proceed as "Jane Roe"); *Florida v. J.L.*, 529 U.S. 266 (2000) (juvenile allowed to proceed by way of initials). K.G. should similarly be allowed to proceed in a way that does not disclose her full name.

CONCLUSION

For the foregoing reasons, K.G. should be permitted to file an amicus brief using her initials rather than her full name.

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QUESTIONS PRESENTED

Petitioners presented two questions in their petition for certiorari. *Amici* will address the first question, which they reframe as follows:

May duly-convicted prisoners like respondent William G. Osborne use 42 U.S.C. § 1983 as a discovery device for obtaining post-conviction access to the state's biological evidence, when doing so would make an end run around legal rights and protections for crime victims found in other bodies of federal and state law?

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IN THE

Supreme Court of the United States

No. 08-6

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF K.G. AND THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*[1]

K.G. is the victim in this case. On March 22, 1993, she was kidnapped, raped, and shot by respondent William Osborne. She comes before this Court asking protection of her rights as a crime victim. In

[1] Together with this brief, *Amici Curiae* have filed letters of consent from counsel for both Petitioner and Respondent. *Amici Curiae* state that no counsel for a party authored any part of this brief, and no person or entity other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

particular, if despite his conviction—and later repeated confessions to the parole board—Osborne is going to seek a federal court order for DNA testing of the state's biological evidence, K.G. believes the Court should require him to do so through a proceeding that fully protects her privacy and other legitimate interests.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and assisting crime victims by providing information on crime victim law and litigating issues of national importance regarding crime victims' rights in cases nationwide.

SUMMARY OF THE ARGUMENT

While K.G. has no wish to recount all of the details of the vicious crime that brings the matter before this Court, it is important to note that respondent William G. Osborne stands convicted of brutally raping her at gunpoint and then shooting her and leaving her to die in the snow in 1993.[2] After his trial in 1994, he was sentenced to serve 21 years in prison.

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[2] The details of that horrible evening are recounted in *Jackson v. State*, Nos. A-5276, A-5329, 1996 WL 33686444 (Alaska Ct. App. Feb. 7, 1996), which affirmed Osborne's conviction. Osborne's conviction for these brutal crimes is the "law of the case."

In 2004, Osborne admitted to the Alaska Parole Board, both in writing and orally, that he had raped and beaten K.G.[3]

On June 26, 2007, Osborne was paroled. On December 29, 2007, he was rearrested and was indicted on four counts of kidnapping, four counts of first-degree robbery (with a deadly weapon), two counts of second-degree assault, four counts of third-degree assault, and one count of first-degree burglary. *See State v. Osborne*, No. 3AN-07-14638 CR (Alaska Super. CT.) (Information filed Dec. 29, 2007). According to the information filed with the charges, Osborne and two other men broke into an apartment and attempted to rob its four occupants at gunpoint. The police arrived while the robbery was in progress

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[3] In his 2004 application for parole, Osborne wrote:

> While I was out with friends I made a call to my codefendant [*i.e.*, Dexter Jackson] to come pick me up from the Space Station. . . . [K.G.] got in the car with us, and we all went out to Earthquake Park. Once there[,] I pulled out a gun and ordered [K.G.] to take off her clothes. After she did, me and my codefendant took turns having sex with her. After we were done[,] I ordered [K.G.] to get out of the car. She refused to do so[,] and kept refusing. I attempted to physically remove her from the car, and eventually got her out. My codefendant became enraged . . . and [he] began to assault her with a stick. I also assaulted [K.G.] by kicking and punching her. After a few seconds[,] we both stopped, partially kicked snow on [K.G.], and then got in my codefendant[']s car and drove off[,] leaving her at the park."

Osborne v. State, 163 P.3d 973, 977 (Alaska Ct. App. 2007). Osborne conveniently forgot to mention that he shot K.G. in the head and left her to die. But even setting that aside, in view of Osborne's detailed confession, it is hard to view his latest legal maneuvers as anything other than a ploy to escape justice by manufacturing some unwarranted doubt about his guilt.

and caught Osborne as he tried to flee. Osborne remains in custody at this time on these new charges. He has nevertheless continued to seek DNA testing of biological evidence regarding his earlier, fourteen-year-old rape conviction to show his purported "innocence" of that crime.

K.G. has important privacy interests at stake in the DNA tests that Osborne proposes to conduct. Osborne apparently plans to test not only a condom that could possibly have been used in the attack, but also K.G.'s clothing—a forensic investigation that could reveal other sexual partners that she has had at times far distant from the rape. Osborne also apparently intends to run tests on K.G.'s blood and extract DNA information about her. These tests threaten to intrude on K.G.'s privacy.

Amici are not arguing that Osborne should be denied any opportunity to seek testing. Amici's more limited point is that by seeking these tests through a § 1983 petition rather than a federal habeas petition, Osborne has effectively made an end run around vital protections for crime victims contained in the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The CVRA guarantees crime victims like K.G. the right to be present and heard in federal habeas proceedings. 18 U.S.C. § 3771(b)(2)(A). The Act also promises victims in habeas proceedings the right to "be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(b)(2)(A). This Court should reject Osborne's § 1983 maneuver because it evades the protections for crime victims that Congress has carefully crafted. Osborne should instead be required to proceed by way of a federal habeas corpus petition, thus ensuring that K.G. will

have protected rights under the CVRA when any testing is considered.

Osborne's approach threatens not only victims' rights found in the CVRA, but also other enactments. If this Court upholds Osborne's § 1983 petition, other prisoners seeking post-conviction access to DNA will no doubt proceed in the same way. This will effectively nullify laws and court procedures in place in virtually all the states and the federal system regulating prisoners' access to DNA evidence, including procedures that protect crime victims. For this reason as well, this Court should reverse the Ninth Circuit's decision granting Osborne's § 1983 petition.

If this Court nonetheless recognizes the viability of a § 1983 claim for post-conviction DNA testing, it should hold that any such claim must be predicated on an actually innocent applicant seeking access to previously-unavailable evidence. The Court should therefore require that an applicant file, under penalty of perjury, an affidavit of actual innocence. The applicant should also be required to demonstrate good cause for not having obtained the testing before trial. Finally, the Court should hold that any testing must be conducted in a fashion that protects the victim's dignity and privacy. Because the Ninth Circuit imposed none of these important prerequisites, its decision should be reversed and the case remanded to see if Osborne can satisfy them.

I. CRIME VICTIMS HAVE IMPORTANT PRIVACY AND PSYCHIATRIC INTERESTS AT STAKE WHEN PRISONERS SEEK POST-CONVICTION TESTING OF DNA EVIDENCE.

A crime victim has significant privacy interests at stake when a prisoner seeks DNA testing of rape-scene evidence. In many cases (including this one), DNA analysis may reveal intimate details about the previous sexual partners of a victim. Moreover, the evidence may include not only biological material from the rapist but also from the crime victim herself. The prisoner may therefore seek (as in this case) to perform analysis of the victim's blood and genetic material—inquiries that can seriously intrude on the victim's privacy.

This case serves as a convenient illustration of the ways in which DNA testing can implicate crime victims' interests. For starters, Osborne proposes to test a condom found near the scene of crime for the presence of his semen. The Ninth Circuit focused exclusively on this request. *See Osborne v. District Attorney's Office for the Third Judicial Dist.*, 521 F.3d 1118, 1136-40 (9th Cir. 2008). But the Ninth Circuit failed to recognize that Osborne's plans are not so narrowly circumscribed. His § 1983 petition asked for broad testing of "K.G.'s clothing that tested positive for seminal fluid and any other clothing that the victim was wearing that may contain semen." Joint Appendix (JA) 24. Moreover, Osborne now admits that he wants to use DNA analysis to "confirm that the epithelial cells identified on the outside of the condom

are from the victim, K.G. . . . ." Br. in Opp'n 6.[4] This would apparently involve testing those cells along with a "reference" blood sample taken from K.G. the day after the rape. *id.* The Ninth Circuit seemingly acceded to all of Osborne's wishes, broadly directing that the state must "open the evidence locker." *Osborne*, 521 F.3d at 1141. So far as appears in the record, if the Ninth Circuit's decision is affirmed, Osborne may conduct unlimited testing on K.G.'s clothing, blood, and any other materials he finds in the evidence locker.

Osborne's broad testing requests raise significant privacy concerns. The condom has some arguable connection to the crime because, if it was in fact the one used by the rapist (a fact open to debate), any semen contained within it would be uniquely linked to the attack. But if allowed to go beyond the condom to test K.G.'s clothing, Osborne will be permitted to embark on a fishing expedition that could lead to, among other things, determination of other sexual partners K.G. may have had at some distant time in the past when wearing the clothing she wore that evening.

Semen samples can remain on clothing for months or even years. If a semen sample is kept in a dry, cool, indoor environment, the DNA associated with it can persist for decades. *See* Howard Coleman & Eric Swenson, *DNA in the Courtroom* 27 (Dwight Holloway & Teresa Aulinskas eds., 1994). For example, Independent Counsel Kenneth Starr was able to develop a semen sample from President Bill Clinton more than seventeen months after a sexual encounter with Monica Lewinsky. Office of The Independent

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[4] Osborne did not seek such testing in the state courts.

Counsel, *The Independent Counsel's Report to Congress on the Investigation of President Clinton* 7 (1998).

Osborne plans to not only search for semen but also to analyze K.G.'s blood. Osborne has not stated exactly what tests he intends to run on the blood, but the potential for invading her privacy is obvious. This Court has previously recognized that testing "of blood[] . . . can reveal a host of private medical facts about [a person], including whether he or she is epileptic, pregnant, or diabetic." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). Osborne could, for instance, conduct an HIV antibody test, which would show whether K.G. has been infected with HIV (the virus that causes AIDS).

While it is unclear how many tests Osborne intends to conduct on K.G.'s physical samples, it is clear that at a minimum he intends to extract a DNA sample from them. Extracting K.G.'s DNA presents serious privacy issues. DNA testing can reveal intimate details about a person, as James Watson (one of the discoverers of the double helix structure of DNA) has explained:

> A DNA sample taken for fingerprinting purposes can, in principle, be used for a lot more than merely providing identity: it can tell you a lot about me—whether I carry mutations for disorders like cystic fibrosis, sickle-cell disease, or Tay-Sachs disease. Some time in the not so distant future, it may even tell you whether I carry the genetic variations predisposing me to schizophrenia or alcoholism—or traits even more likely to disturb the peace.

James D. Watson & Andrew Berry, *DNA: The Secret of Life* 273 (Random House 2004) (2003). Not

surprisingly, "when the result of genetic testing can mean so much, people want, more than ever, to keep that information private." Stephen Breyer, *Furthering the Conversation about Science and Society*, in DNA and the Criminal Justice System: The Technology of Justice 13, 17 (David Lazer ed., 2004). Some state legislatures (including Alaska's) have responded to this strong privacy concern by making a person's genetic information their own private property.[5] Courts, too, have recognized that DNA analysis differs from traditional evidence collection methods. *See, e.g., Patterson v. State*, 742 N.E.2d 4, 10 n.3 (Ind. Ct. App. 2000) ("DNA analysis provides unprecedented access into an individual's future physical and psychological health, the health of close relatives, and insight into paternity issues."). And even if the genetic testing that the Osborne proposes to conduct in this case might be viewed as insufficiently discriminating and invasive to harm K.G.'s privacy interests, this Court must "take the long view," *Kyllo v. United States*, 533 U.S. 27, 40 (2001), about how technology might progress in this area.

This Court must also consider that fact that the crime of rape is frequently not reported. The National Institute of Justice recently found that rape is a "seriously underreported crime," as only 19.1% of women who were raped reported that fact to the police. U.S. Dept. of Justice, National Institute of Justice, *Special Report: Extent, Nature, and Con-*

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[5] *See, e.g.*, Alaska Stat. § 18.13.010; Colo Rev. Stat. Ann. § 10-3-1104.7; Fla. Stat. Ann. § 760.40; Ga. Code Ann. § 33-54-1; La. Rev. Stat. Ann. § 22:213.7. *See generally* Gary E. Marchant, *Property Rights and Benefit-Sharing for DNA Donors?*, 45 Jurimetrics J. 153 (2005).

sequences of Rape Victimization: Findings from the National Violence Against Women Survey 33 (2006). Researchers have discovered that among the significant barriers to reporting are concerns related to confidentiality. *See, e.g.*, M.R. Sable *et al.*, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. Am. Coll. Health 157, 159 (2006).

Amici fully recognize the competing interests at stake in this case. *Amici* do not maintain that K.G.'s privacy interests necessarily trump Osborne's desire to test the biological evidence in this case. Rather, *Amici* argue that K.G's privacy concerns should be weighed in the balance and that a procedure that end runs consideration of such interests and legal protections is impermissible. Transferring the evidence to a defense criminologist is not (as Osborne describes it) a "simple, ministerial act," Br. in Opp'n 29, but rather an important decision with potential privacy implications that courts should carefully evaluate.

One way in which K.G.'s privacy could have been protected by the Ninth Circuit was through an order sequencing the various tests. The defense could have first been granted access only to the condom and permitted to test any semen in it. If the semen indeed came from Osborne (as seems a virtual certainty given his written confession to the Parole Board), then his guilt would be reconfirmed and there would be no need for *any* further testing of K.G.'s samples. Only if Osborne's semen was not found in the condom should further testing have been allowed. Proceeding in this sequential fashion does not compromise any legitimate interest of Osborne's but would help protect K.G.'s privacy. *See* National Comm. on the Future of DNA Evidence, *Post-*

Conviction DNA Testing: Recommendations for Handling Requests 14 (1999) (recommending that "elimination" samples from third parties "should not be sought until after an exclusion has been obtained from DNA testing", thereby helping to "minimize stress for victims and third parties").

The Ninth Circuit should also have protected K.G.'s privacy by requiring defense counsel to precisely explain what tests it planned to perform on the evidence in this case and how those tests were necessary to prove Osborne's claim of innocence. In other words, Osborne should not have been given an open-ended license to conduct a fishing expedition into the biological evidence this case. As part of this process, the Ninth Circuit should also have placed any test results under seal and required that defense counsel use the results exclusively for purposes related to this litigation. Finally, in crafting these limitations, the Ninth Circuit should have made an effort to determine what K.G.'s views were about the testing and the subsequent use of any test results.

II. OSBORNE SHOULD BE REQUIRED TO PROCEED BY WAY OF A FEDERAL HABEAS CORPUS PETITION SO THAT K.G.'S PRIVACY RIGHTS UNDER THE CRIME VICTIMS' RIGHTS ACT ARE RESPECTED.

The overarching structural reason for the Ninth Circuit's failure to consider K.G.'s legitimate interests is that it permitted Osborne to proceed through a § 1983 petition—a civil process that contains no protections for crime victims—rather than through a federal habeas corpus petition that would trigger crime victim protections. To be sure, in theory, K.G.

could have intervened in the civil proceedings below to press her concerns. *See* Fed. R. Civ. P. 24. But K.G. is not familiar with such complex legal principles, as is no doubt the case for most crime victims. *See Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."). She could not, and cannot, afford to retain the legal counsel necessary to carry out such a complex maneuver. *See* John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 McGeorge L. Rev. 689, 696-98 (2002) (discussing the problem of crime victims obtaining legal counsel).[6]

The Ninth Circuit should have required Osborne to proceed through a federal habeas petition. In the habeas process, the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, protects the interests of crime victims, including the rights of victims like K.G. "to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). Osborne should not be permitted to circumvent these important protections by the simple expedient of labeling his request for testing a § 1983 action.

A. The Crime Victims' Rights Act Protects Victims' Rights In Federal Habeas Corpus Proceedings.

Passed by Congress in 2004, the Crime Victims' Right Act is a far-reaching federal statute that protects victims' rights in the federal criminal justice

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[6] K.G. is represented before this Court by pro bono legal counsel.

system. *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835, 840-50. The CVRA rejects the long-held assumption "that crime victims should behave like good Victorian children—seen but not heard." *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). Instead, the CVRA seeks to dramatically transform the system by "making victims independent participants in the criminal justice process." *Id.* Congress acted because "[i]n case after case [it] found victims . . . were ignored, cast aside, and treated as non-participants in a critical event in their lives." 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein).

Enacted with near universal congressional support, the CVRA is a "broad and encompassing" statutory victims' bill of rights. 150 Cong. Rec. S4261 (Apr. 22, 2004) (statement of Sen. Feinstein). To make victims participants in the process, the Act specifically grants to victims rights to notice of court hearings, to attend those hearings, and to speak at plea and sentencing hearings. 18 U.S.C. §§ 3771(a)(2)-(4). The Act also promises victims that they will be treated "with respect for [their] dignity and privacy." 18 U.S.C. § 3771(a)(8).

In its original form, the Act protected only victims of federal offenses during federal criminal proceedings. *See* 18 U.S.C. §§ 3771(b)(1), (e). In 2006, as part of the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587, Congress extended crime victims' rights to victims during federal habeas corpus proceedings. The extension gave the victims of state crimes rights that federal

courts must respect while resolving habeas petitions—including the right to be present and heard at those proceedings, as well as the right to proceedings free from unreasonable delay and the right to be treated with fairness and with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(b)(2)(A).

B. Osborne and Other Post-Conviction Testing Applicants Should Not Be Permitted to Circumvent the CVRA's Protections for Crime Victims By Avoiding the Federal Habeas Corpus Process.

By raising his claim for DNA testing through a § 1983 petition rather than a federal habeas petition, Osborne has effectively made an end run around the crime victims' protections found in the CVRA. Because Osborne's § 1983 action was neither a federal criminal prosecution nor a federal habeas corpus action, K.G. was left without any rights in the process. This approach runs contrary to the command of Congress in passing the CVRA that crime victims' rights must now be respected throughout the criminal justice process.

This Court reached a similar conclusion in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), where a prisoner sought to challenge the calculation of good time credits via a § 1983 action. This Court held that such a challenge must be brought through a habeas petition:

> In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congres-

> sional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings."

Id. at 489-90. In this case, it would likewise frustrate explicit congressional intent that crime victims have protected rights in the habeas process if prisoners seeking DNA testing can simply put a different label on what should be habeas petition. *See Harvey v. Horan*, 278 F.3d 370, 377 (4th Cir. 2002) (rejecting effort to obtain DNA testing through a § 1983 petition because the "claim is more properly pressed as a habeas corpus petition . . .").

K.G. was the victim of atrocious state crimes committed by Osborne, namely kidnapping, first-degree assault, and two counts of first-degree sexual assault. *See Jackson v. State*, Nos. A-5276, A-5329, 1996 WL 33686444, at *3 (Alaska Ct. App. Feb. 7, 1996) (describing counts of conviction). Therefore, under the CVRA, K.G. would have important rights if Osborne had proceeded by way of a federal habeas corpus petition. Of particular importance, K.G. would have a protected right "to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8) (granting this right to victims); 18 U.S.C. § 3771(b)(2)(A) (extending this right to federal habeas proceedings).

In a habeas action, K.G.'s right under the CVRA to be treated with respect for her dignity and privacy would have required the district court and the Ninth Circuit to ensure that any testing (as well as any subsequent disclosure of testing results) be conducted in a way that protected her interests. Indeed, it bears emphasizing that a habeas application would have triggered a judicial obligation under the CVRA

to respect K.G's interests without any court appearance on her part. A federal court considering a habeas petition from Osborne would have been obligated on its own initiative to "ensure" that K.G. was "afforded" her rights. 18 U.S.C. § 3771(b)(2)(A). This fact is important because K.G. has lacked the funds to obtain legal counsel to protect her interests during Osborne's extended legal maneuvering in both state and federal courts at both the trial court and appellate levels. She is a typical crime victim in this sense, as crime victims (like criminal defendants) are disproportionately poor. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States* tbl.14 (2006) (finding higher victimization rates at lower income levels).

Curiously, the Ninth Circuit itself had seemingly recognized that a federal habeas petition was the proper way to proceed in cases seeking post-conviction DNA testing. In an earlier decision, *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992), the Ninth Circuit had granted post-conviction access to allegedly exculpatory semen evidence through a federal habeas petition. The decision below relied on *Thomas* as the basis for allowing access to evidence. But without any clear explanation, it simply declined to require Osborne to follow this approach. *See Osborne*, 521 F.3d at 1132 ("Faced now with the argument that *Thomas* should be limited to cases with ongoing habeas petitions, we reject that view and hold that Osborne is entitled to assert in this § 1983 action the due process right to post-conviction access to potentially exculpatory DNA evidence that we recognized in Thomas."). The Circuit had it right fifteen years earlier in *Thomas*: an applicant seeking post-conviction access to allegedly exculpatory DNA evidence through the federal courts must proceed by

way of federal habeas petition, thereby ensuring that crime victims' rights are respected.

III. RECOGNIZING A FREE-STANDING SECTION 1983 CLAIM FOR POST-CONVICTION ACCESS TO BIOLOGICAL EVIDENCE WILL EFFECTIVELY NULLIFY LAWS AND PROCEDURES ADOPTED BY THE STATES AND CONGRESS THAT COVER THE SAME SUBJECT AND PROTECT CRIME VICTIMS' INTERESTS.

If this Court holds that Osborne can obtain post-conviction DNA testing through a § 1983 petition, this Court will effectively negate laws and court procedures for such testing that are in place in virtually all 50 states and the federal system. These recently-adopted procedures not only allow applicants to obtain DNA evidence, but also protect crime victims' legitimate interests in privacy and finality. Prisoners would have no reason to follow these approaches to obtaining evidence if an unconstrained § 1983 claim is available to them. As Judge Wilkinson has explained,

> state courts, if given a chance, can rise to their responsibilities. Yet . . . [recognizing a § 1983 claim for DNA testing] . . . would not only deny them that chance, but do so in unprecedented fashion, encouraging state prisoners to press their claims initially in federal court while disregarding all state court procedures and all state legislative avenues of redress.

Harvey v. Horan, 285 F.3d 298, 301 (4th Cir. 2002) (Wilkinson, J., concurring in denial of rehearing). This Court should not use the general language of §

1983 to sweep away such a carefully-considered body of law and undo its protections for crime victims.

A. The States and Congress Have Established Procedures for Obtaining Post-Conviction Access to DNA Evidence With Prerequisites that Indirectly Protect Crime Victims.

As Osborne conceded in opposing certiorari in this case, "[t]oday, forty-three states and the District of Columbia have such laws [governing DNA testing after conviction], the vast majority of which were enacted this decade." Br. in Opp'n 8-9 (collecting citations). The other seven states appear to generally provide for post-conviction access to DNA evidence by court decision or general habeas provisions.[7] Congress also acted in 2004 to provide federal prisoners

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[7] Of the seven states without specific post-conviction DNA statutes, five have appellate court opinions recognizing the possibility of obtaining DNA testing through other procedures. *See Dowdell v. State*, 854 So.2d 1195, 1198 (Ala. Crim. App. 2002); *Osborne v. State*, 110 P.3d 986, 995 (Alaska Ct. App. 2005); *Commonwealth v. Burke*, 809 N.E.2d 1101 (Mass. App. Ct. 2004) (Table) (unpublished); *Brewer v. State*, 819 So.2d 1169, 1172 (Miss. 2002); *Jenner v. Dooley*, 590 N.W.2d 463, 472 (S.D. 1999). The two remaining states—Oklahoma and South Carolina—do not appear to have had the issue presented in an appellate court decision. *See generally* Marjorie A. Shields, *DNA Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial or Other Postconviction Relief in Criminal Case*, 125 A.L.R.5th 497 (2005 & 2008 Supp.). But even in these states, prisoners have apparently obtained their release through DNA testing. *See* www.innocenceproject.org/Content/258.php (Calvin Lee Scott released in Oklahoma); www.innocenceproject.org/Content/220.php (Perry Mitchell released in South Carolina).

with access to post-conviction DNA testing. *See* 18 U.S.C. § 3600.

In view of these state and federal approaches, prisoners in this country now possess virtually universal opportunities to request post-conviction DNA testing. At the same time, however, these laws and court decisions also impose important and reasonable threshold requirements—requirements that protect crime victims.

For example, to avoid frivolous applications for testing, many states and Congress require the applicant to file a statement—under penalty of perjury—that he is actually innocent.[8] A number of states further require the applicant to provide some good cause for failing to have made the request for DNA testing earlier, such as showing that the technology was unavailable at the time of trial.[9]

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[8] *See, e.g.*, Fla. Stat. Ann. § 925.11(2)(a); Mont. Code Ann. § 46-21-110(1); N.H. Rev. Stat. Ann. § 651-D:2(I)(a);N.C. Gen. Stat. § 15A-269(b)(3); 42 Pa. Cons. Stat. Ann. § 9543.1(c)(2)(i); Utah Code Ann. § 78-35a-301(2); Vt. Stat. Ann. tit. 13, § 5561(a)(2).

[9] *See, e.g.*, Ark. Code Ann. § 16-112-201(a); Cal. Penal Code § 1405(6); Colo. Rev. Stat. § 18-1-413(1); Del. Code. tit. 11, § 4504(a)(2); Fla. Stat. Ann. § 925.11(2)(a)(2); Ga. Code Ann. § 5-5-41(c)(3)(a); Haw. Rev. Stat. § 844D-123(a)(4); Idaho Code §19-4902(b); 725 Ill. Comp. Stat. Ann. 5/116-3(A)(1), (2); Ind. Code Ann. § 35-38-7-8(3); Kan. Stat. Ann. § 21-2512(a)(3); Ky. Rev. Stat. § 422.285(2)(c); Me. Rev. Stat. Ann. tit. 15, § 2137(4-A)(C); Mich. Comp. Laws § 770.16; Minn. Stat. § 590.01(a)(2); Mo. Rev. Stat. § 547.035(2); Mont. Code Ann. § 46-21-110(1)(5)(f); N.H. Rev. Stat. Ann. § 651-D:2(I)(d); N.J. Stat. Ann. § 2A:84A-32a(d)(6); N.M. Stat. Ann. § 31-1a-2(C)(3); N.C. Gen. Stat. § 15A-269(a)(3); N.D. Cent. Code Ann. § 29-32.1-15(1)(b); 42 Pa. Cons. Stat. Ann. § 9543.1(a)(2); R.I. Gen. Laws § 10-9.1-11(a)(3); Tenn. Code Ann. § 40-30-303(3); Tex. Code Crim. Proc. Ann. art. 64.01(b); Utah Code Ann. § 78-35a-301(2)(d); Vt. Stat. Ann. tit. 13, § 5566(3); Va. Code Ann. § 19.2-327.1(A); Wash. Rev. Code

Still other states require an applicant to move quickly in seeking DNA testing by establishing a statute of limitation for such applications.[10]

All of these provisions serve important interests for crime victims. A victim should not be forced to face the uncertainty of DNA testing and possible resulting release of a convicted prisoner unless that prisoner is truly innocent. An affidavit of actual innocence under penalty of perjury helps to discourage fraudulent applicants. Moreover, when a prisoner has deliberately chosen for tactical reasons not to use a discriminating DNA test before trial, it hardly seems fair to the victim to permit him after he is convicted to switch and obtain a "second bite at the apple." Finally, a statute of limitations serves not merely the State's interest in finality, but also the victim's interest as well. As this Court has recognized,

> Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an

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§ 10.73.170(2)(a); W. Va. Code Ann. § 15-2B-14(6); Wis. Stat. Ann. § 974.07(2)(c); Wyo. Stat. Ann. § 7-12-303(c)(viii).

[10] *See, e.g.*, 18 U.S.C. § 3600(a)(10)(A) (rebuttable presumption application is not timely if not filed within five years of the passage of the Act or within three years of conviction); Mich. Comp. Laws § 770.16(1) (application "shall be filed not later than January 1, 2009"); Minn. Stat. § 770.16(1) (application must be filed by January 1, 2009); Okla. Stat. tit. 22, § 1371 ("Oklahoma Indigent Defense System DNA Forensic Testing Program to continue until July 1, 2005"); *see also* La. Code Crim. Pro. 926.1 (applicant convicted of a felony can apply before August 31, 2009, for testing without regard to time limit rules, but after must follow normal time limit rules).

> interest shared by the State and the victims of crime alike.

Calderon v. Thompson, 523 U.S. 538, 556 (1998) (internal quotation omitted). Crime victims naturally do not want distant events dredged up again, particularly when (as in this case) they involve events that the victim would like to put behind her.[11]

B. The States Have Also Protected Crime Victims' Interests Directly in Post-Conviction DNA Access Procedures and in Crime Victims' Rights Amendments to Their State Constitutions.

Not only have crime victims' interests been protected indirectly through procedural requirements governing post-conviction DNA testing, but eleven states directly provide that victims must be (or can be) notified of post-conviction DNA testing results and related issues.[12] In addition to the eleven states that specifically provide crime victims' rights in their DNA statutes, most other states indirectly protect such rights through their general crime victims' rights constitutional amendments and statutes. These state constitutional amendments and statutes guarantee victims the right to be treated with fairness, dignity, and respect throughout the criminal

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[11] Since her miraculous survival that evening when Osborne shot her in the head, K.G. has changed her life and is now runs her own small business.

[12] *See* Ariz. Rev. Stat. §13-4240(J); Haw. Rev. Stat. § 844D-132(c); Ind. Code Ann. § 35-38-7-16; Ky. Rev. Stat. § 422.285(8); Me. Rev. Stat. Ann. tit. 15, § 2137(13); Mich. Comp. Laws § 770.16(10); Mont. Code Ann. § 46-21-110; Utah Code Ann. § 78B-35a-301(10); Vt. Stat. Ann. tit. 13, § 5563; Wash. Rev. Code § 10.73.170(5); Wis. Stat. Ann. § 974.07(4)(a).

justice process[13]—including presumably post-conviction proceedings attempting to obtain access to DNA evidence to obtain a release from a criminal sentence.

C. Affirming the Ninth Circuit's Decision Would Allow Applicants to Completely Bypass Victim-Protective State Procedures.

If this Court affirms the Ninth Circuit's decision, all of the work that the states and Congress have done to directly and indirectly protect crime victims' interests in post-conviction DNA testing will be nullified. Applicants seeking evidence for testing would obviously follow the Ninth Circuit's no-strings-attached approach of a § 1983 claim rather than the carefully-prescribed procedures contained in state and federal law.[14]

There should be no mistake about how broadly the Ninth Circuit's opinion sweeps. The opinion essentially wipes away any meaningful time limits for

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[13] Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1(A)(1); Conn. Const. Art. 1, § 8(b); Idaho Const. art. I, § 22(1); Ill. Const. art. 1, § 8.1(a)(1); La. Const. Art I, §25; Md. Const. Decl. of Rts. art. 47(a); Mich. Const. art. I, § 24(1); Miss. Const. art. 3, § 26A(1); N.J. Const. art. I, § 22; N.M. Const. art. II, § 24(A)(1); Ohio Const. art. I, § 10a; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24(A)(1); Tex. Const. art. I, § 30(a)(1); Utah Const. art. I, § 28(1)(a); Va. Const. art. I, § 8-A(2); Wis. Const. art. I, § 9m; Colo. Rev. Stat. § 24-4.1-302.5; D.C. Code § 23-1901(b)(1); Haw. Rev. Stat. § 801D-1; Ind. Code § 35-40-5-1; Kan. Stat. Ann. § 74-7333(a)(1); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(a); Pa. Stat. Ann. § 11.102(1); Tenn. Code Ann. § 40-38-102; Vt. Stat. Ann. tit. 13, § 5303(a); Wash. Rev. Code § 7.69.010

[14] While federal prisoners cannot file a § 1983 action, they could presumably assert constitutional claims for access to evidence via a Bivens-style action. See infra p. 28.

filing a claim for access to DNA evidence, given that Osborne's conviction was affirmed in 1996 and his § 1983 petition was filed seven years later in 2003. *See* Appendix to Petition for Certiorari 113a and JA 23. The Ninth Circuit did not even require Osborne to make the seemingly obvious threshold showing that a DNA testing procedure was unavailable to him at his trial. Nor did the Ninth Circuit impose any restrictions on his seeking access to evidence, such as requiring that he declare under penalty of perjury that he is actually innocent of his crime.

What the Ninth Circuit expansively allows the Fourth Circuit has properly prevented. In defending that Circuit's rejection of a § 1983 claim for post-conviction access to DNA evidence, Judge Wilkinson explained that such claims allow applicants "to bypass Virginia's [and other states'] system of criminal justice altogether. . . . Such disregard of process is an anomaly in an area where criminal defendants, above all, rely on proper process to protect their rights." *Harvey v. Horan*, 285 F.3d 298, 299 (4th Cir. 2002) (Wilkinson, J., concurring in denial of rehearing).

This Court has been wary of broadly preempting state criminal justice procedures. This Court has warned of the need to give state courts "the first chance at remedying their own mistakes," thereby avoiding "the unseemly spectacle of federal district courts trying the regularity of proceedings had in courts of coordinate jurisdiction." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973) (internal quotation omitted). It is by design that:

> judgments of conviction in criminal cases are not casually reached. The efforts of jurors, judges, witnesses, prosecutors, and defense attorneys

> represent a considerable and conscientious effort at achieving justice—an effort which would be lost if the court or system rendering the judgment were entitled to no respect or even so much as acknowledgment thereafter.

Harvey, 285 F.3d at 300 (Wilkinson, J., concurring in denial of rehearing).

Indeed, if post-conviction § 1983 claims for access to evidence are recognized, federal courts will be precluded from even staying these federal proceedings until simultaneous state court proceedings on the same subject have concluded. This Court recently admonished federal district courts that "§ 1983 contains no judicially imposed exhaustion requirement; absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed." *Edwards v. Balisok*, 520 U.S. 641, 649 (1997) (internal citation omitted).

Weighed against all of these costs, Osborne can provide no real benefits on his side of the ledger. There is no demonstrated need for federal courts to create a § 1983 action to free the innocent. Osborne himself made this point quite clearly in opposing *certiorari*. His opposition brief explained that "out of the 220 convicted persons in the U.S. who have been exonerated by DNA testing to date, only one obtained his exculpatory DNA tests through a § 1983 action." Br. in Opp'n 13. The single case arose in 2001 in Pennsylvania, which has long since enacted a post-conviction DNA testing statute. 42 Pa. Cons. Stat. § 9543.1 (adopted in 2002).

In view of the good-faith responses by both the state and federal governments to provide access to

post-conviction DNA testing to those with legitimate claims to it, "Only the most aggressive view of federal judicial power could lead us to preempt both a coordinate branch of the federal government and the state courts and legislatures with what would be in essence prescriptive law making of" the federal courts. *Harvey*, 285 F.3d at 301 (Wilkinson, J., concurring in denial of rehearing). This Court should not preempt the developments in this area, including the notable protections for crime victims that the states have evolved. This Court should instead allow the democratic process to operate by declining to recognize a § 1983 claim for post-conviction DNA testing and instead requiring prisoners to proceed through established state and federal procedures.

IV. EVEN IF THIS COURT RECOGNIZES A SECTION 1983 CLAIM FOR POST-CONVICTION ACCESS TO DNA EVIDENCE, THE CLAIM SHOULD BE NARROWLY DEFINED TO PROTECT CRIME VICTIMS' LEGITIMATE INTERESTS IN PRIVACY AND FINALITY.

Even if this Court decides that it is going to recognize a § 1983 claim for post-conviction access to evidence, an applicant (like Osborne) must present a claim that a state actor has subjected him to "the deprivation of . . . rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983. Osborne describes the right at stake here as the right of "certain convicted persons . . . [to] conduct previously-unavailable DNA testing, at no cost to the State, in order to establish their actual innocence." Br. in Opp'n 1. Assuming *arguendo* that this Court recognizes such a right, the right would then implicitly require an applicant to make several

showings: First, that the applicant is attempting to prove "actual innocence"; second, that the evidence was indeed "previously-unavailable"; and third, that the evidence will help "establish" actual innocence – a materiality requirement. [15] The Court should therefore construe § 1983 as requiring that applicants prove these points, as well as requiring that they proceed in a way that is fair to victims of crime.

A. The Applicant Should Be Required to File a Sworn Affidavit, Under Penalty of Perjury, That He is Actually Innocent of the Crime.

Osborne's § 1983 petition claims that his due process rights have been violated because the state is withholding biological evidence that would prove his actual "innocence." His innocence is, therefore, a prerequisite to any constitutional deprivation by the state. The Ninth Circuit described this as a "Catch-22" because, in its view, without testing the evidence, Osborne would have no way of demonstrating his innocence. *Osborne*, 521 F.3d at 1129.

The Ninth Circuit was wrong to assume, however, that Osborne had no way to begin proving his innocence before conducting testing. He could start to do so by providing a sworn affidavit, under penalty of perjury, that he is indeed innocent. Many states have made such a sworn statement a pre-requisite to moving forward with a post-conviction application for DNA testing. *See supra* p. 19 n. 8. This requirement is vitally important to crime victims, as it can help deter fraudulent claims for DNA testing by guilty

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[15] This brief will not discuss the "materiality" requirement, leaving that to the parties.

prisoners, thereby preventing the psychological trauma that attends reopening of long-closed criminal proceedings.

Recognizing the obvious fact that a sworn statement from Osborne would be evidence of innocence, defense counsel filed in the district court a carefully-prepared and notarized affidavit from Osborne attempting to make it appear that he had indeed made such an assertion. But rather than proclaim his innocence, Osborne cagily states that "I have no doubt whatsoever that re-testing of the condom will prove once and for all time *either my guilt or innocence*" and that "I have always *maintained* my innocence." *Osborne v. District Attorney's Office for Third Judicial Dist.*, No. A03-0118-CV (D. Alaska) (Notice of filing affidavit June 7, 2006) (docket #112) (emphases added). If testing is done and the semen and pubic hair samples in this case match Osborne (as seems almost certain), it would be virtually impossible for the state to then prosecute him for perjury based on such cleverly-hedged statements.

In construing § 1983, this Court has not hesitated to ensure that congressional will is fulfilled. Here there can be little doubt about how Congress would have wanted a post-conviction DNA application to proceed. When it enacted the Innocence Protection Act of 2004, 18 U.S.C. § 3600, it required— as the very first prerequisite—that an applicant "assert, under penalty of perjury, that the applicant is actually innocent of [the crime involved]." 18 U.S.C. § 3600(a)(1). The reason for this requirement was to provide a "check[] against frivolous litigation . . . ." 150 Cong. Rec. S10676 (Oct. 7, 2004) (statement of Sen. Leahy). Without such a check, guilty prisoners might use post-conviction requests

for DNA testing to "muddy the waters" and "fuel a new and frivolous series of appeals." 149 Cong. Rec. S12294 (Oct. 1, 2003) (statement of Sen. Hatch).

To be sure, the Innocence Protection Act applies to federal prisoners, not state prisoners like Osborne. But if this Court affirms the Ninth Circuit and finds a constitutional right to access post-conviction DNA evidence even without a sworn declaration of innocence, then this congressional requirement could be effectively invalidated. This Court has previously held that constitutional violations actionable under § 1983 against state officers are actionable by virtue of the Constitution itself against federal officers in certain situations. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). If state prisoners possess a federal constitutional right to force state authorities to turn over biological evidence for post-conviction DNA testing without a sworn affidavit of innocence, then presumably federal prisoners would argue that they possess the same right as well. If the Court agrees,[16] prisoners would be able to avoid the procedural requirements of the Innocence Protection Act by simply filing a straight constitutional claim against the federal government.

If nothing else is obvious in this case, it is at least plain that allowing prisoners to pursue § 1983 claims

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[16] Presumably litigation would ensue over whether DNA access claims fall within the parameters of already-recognized *Bivens* claims, *see, e.g., Carlson v. Green*, 446 U.S. 14 (1980) (extending *Bivens* to 8th Amendment claims by prisoners) and, if not, whether the Innocence Protection Act is an alternative remedial scheme that requires the Court to "stay its *Bivens* hand." *Wilkie v. Robbins*, __ U.S. ___, 127 S.Ct. 2588, 2600 (2007).

for testing of DNA evidence will entail significant costs, both by unsettling the finality of criminal judgments and by forcing crime victims to undergo the uncertainties that such testing entails. Before a prisoner is allowed to impose these costs, this Court should require as a minimum pre-requisite that he provide a direct statement under penalty of perjury that he is actually innocent of the crime for which was convicted. This case should therefore at least be remanded to see whether Osborne will swear under oath that he did not rape K.G.

B. The Applicant Should Be Required to Show Good Cause for Not Having Conducted Testing Before Conviction.

Osborne describes his constitutional claim as a post-conviction right to "conduct *previously-unavailable* DNA testing . . . ." Br. in Opp'n 1 (emphasis added). This formulation makes some sense: if a prisoner could have done the DNA testing before trial, the State cannot realistically be said to have deprived him of any access to evidence. Moreover, this Court has instructed that "[t]here is no general constitutional right to discovery in a criminal case," *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)—much less a general constitutional right to discovery after conviction. And any obligation to produce exculpatory evidence is limited to situations "involv[ing] the discovery, after trial, of information which had been known to the prosecution but *unknown* to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added).

In light of these principles, an applicant should not be able to obtain *post*-conviction testing of biological evidence unless he demonstrates good cause for

failing to obtain *pre*-conviction testing. Any other approach would be unfair to crime victims. It would let a criminal gamble on an acquittal at trial without testing. Then, if convicted, the criminal could take a second shot at acquittal by seeking new DNA testing—all the while extending the uncertainty and anxiety that the crime victim understandably will feel while the prisoner's original conviction and sentence remains subject to being potentially overturned.

A number of states have imposed a requirement that the applicant show some level of good cause for failing to secure previous testing. *See supra* p. 19 n. 9. Of course, this requirement will be easily satisfied where DNA technology simply did not exist. In other cases, however, satisfying this requirement will prove more difficult. In this case, for example, Osborne's defense attorney did not ask for more precise DNA testing before trial because "Osborne was in a strategically better position without [more specific] DNA testing." *Osborne*, 110 P.3d at 990. The decision was, the Alaska Court of Appeals concluded after reviewing the evidence, "a tactical one." *Id.* at 991.

The Ninth Circuit did not require Osborne to establish that more discriminating testing was unavailable to him before trial. The case should therefore be remanded for further proceedings to resolve this issue.

C. The Victim of the Crime Should be Treated Fairly and With Respect for Her Dignity and Privacy and Should be Heard With Regard to Any Testing.

Finally, the Ninth Circuit's decision is flawed because it utterly failed to consider K.G.'s interests

as crime victim in allowing Osborne to pursue under § 1983 unlimited testing. There can be little doubt that Congress would want victims' interests considered in construing the broad language of § 1983. In passing the Innocence Protection Act of 2004, Congress explicitly directed that any testing must be "reasonable in scope." 18 U.S.C. § 3600(a)(5). More broadly, as explained earlier, Congress has commanded that crime victims have "the right to be treated with fairness and with respect for the victim's dignity and privacy," 18 U.S.C. § 3771(a)(8), and has extended these rights to both federal criminal and habeas proceedings, 18 U.S.C. §§ 3771(b)(1), (2).

In construing § 1983 in other contexts, the Court has not hesitated to read into the general language qualifications to insure that congressional concerns are not frustrated. For instance, in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), this Court read § 1983 as containing a doctrine of judicial immunity in light of presumed congressional intentions. Similarly, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court created an exception to § 1983, precluding its use by prisoners in lieu of federal habeas proceedings. To do otherwise, this Court explained, "would wholly frustrate explicit congressional intent." *Id* at 489. And the Court has also read procedural requirements into the statute. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (creating more relaxed procedural requirements for *pro se* § 1983 suits).

In the same fashion as these decisions, this Court should construe any right for prisoners to use §1983 to obtain post-conviction access to DNA testing as being implicitly bounded by the requirement that the testing be "reasonable in scope"—the same requirement found in the recently-passed Innocence Pro-

tection Act of 2004, 18 U.S.C. § 3600(a)(5). Testing is obviously not reasonably in scope if it is conducted without regard for the victims' interests in dignity and privacy. In the opening section of this brief (*supra* pp. 3-11), Amici explained some of the ways in which the unrestrained testing the Ninth Circuit has apparently approved in this case could inappropriately violate her privacy. Because the Ninth Circuit failed to give any consideration whatsoever to K.G.'s privacy concerns, this case should be remanded for further proceedings to consider what limits should be placed on any testing.

As part of that remand, K.G. should have the right to be heard during the proceedings without any formal intervention motion. While K.G. is now represented by *pro bono* legal counsel, in other cases indigent crime victims will typically lack legal counsel. This Court should therefore admonish lower courts that, in the future, they should take steps to hear from crime victims about the scope of any testing. In particular, lower courts should request that prosecutors relay any concerns that crime victims might have about the scope of testing. Lower courts should also use their statutory and discretionary power to appoint counsel for crime victims when important victims' issues appear to be at stake. *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835, 912-16 (reviewing judicial power to appoint counsel for crime victims).

In cases such as this, fairness will only be achieved by hearing from crime victims like K.G. and crafting testing procedures that protect their interests . As this Court has repeatedly held, "'Justice, though due

to the accused, is due to the accuser also. . . . We are to keep the balance true.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.)). The decision of the Ninth Circuit should be reversed and the case remanded for consideration of K.G.'s privacy and other concerns in the proposed testing procedures.

CONCLUSION

For the foregoing reasons, and for those provided by Petitioner, the decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

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No. 08-6

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IN THE
SUPREME COURT OF THE UNITED STATES

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

This brief is submitted on behalf of the City of New York as amicus curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

Amicus, the City of New York, is a municipal corporation. The New York City Law Department – Office of the Corporation Counsel, represents the Office of the District Attorney - Bronx County (Bronx, New York), the Office of the District Attorney - Kings County (Brooklyn, New York), the Office of the District Attorney - Queens County (Queens, New York), and the Office of the District Attorney - Richmond County (Staten Island, New York).

The District Attorney of Queens County, Richard Brown, is a party in a matter presently before the United States Court of Appeals for the Second Circuit: *McKithen v. Brown*, 08-4002-pr, which involves the question of whether there is a constitutional right to post-conviction DNA testing and, if so, what are the contours of such a right. Because of the importance to amicus of the issues before this Court, amicus submits this brief to assist the Court in its resolution of this case.

SUMMARY OF THE ARGUMENT

This brief *amicus curiae* will show that respondent has not been denied any constitutional protection secured by the Fifth and Fourteenth Amendments. The post-conviction relief sought by plaintiff would require an unwarranted expansion of both procedural and substantive protections. Accordingly, the scope of federal review

should not be extended to post-conviction claims of actual innocence based on newly asserted evidence.

We submit that the § 1983 complaint seeking post-conviction DNA testing must be dismissed because it effectively challenges or necessarily implies the invalidity of his conviction and confinement and, therefore, must be challenged by a petition for a writ of habeas corpus.

ARGUMENT

I. The Fourteenth Amendment Residual Liberty Interest Retained By Prisoners Lawfully Deprived Of Their Freedom Does Not Encompass An Interest In Accessing Or Possessing Biological Evidence Post-Conviction.

A. No Fundamental Right Of Access To DNA Is Deeply Rooted In History And Tradition.

The Due Process Clause provides protection in the form of both procedural due process and substantive due process.[1] Substantive due process prohibits the government from infringing on a fundamental interest unless the government has a compelling interest and the infringement is narrowly tailored. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Fundamental interests are identified by a determination of whether the interest is "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed (citations omitted)." *Id.* at 720-21.

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[1] *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000).

This Court, noting its reluctance to expand the concept of substantive due process, warns that "where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994). On considering governmental behavior to determine whether an action violates a fundamental, substantive due process right, a court begins with a careful description of the asserted right, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), before determinating whether the conduct shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

It is long established that criminal defendants have no constitutional right to have the constitutionality of their conviction reviewed on direct appeal. *McCane v. Durston*, 153 U.S. 684 (1894); *Abney v. United States*, 431 U.S. 651, 656 (1977). The Court, holding that a "state need not provide any appeal at all," observed that the Constitution typically does not require a state to provide post-conviction avenues for attacking criminal convictions, and noted

> "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature . . . States have no obligation to provide this avenue of relief."

Pennsylvania v. Finley, 481 U.S. 551 (1987). The only constitutional provision relevant in the present case is the Due Process Clause and, accordingly, the issue before the Court is whether the Due Process Clause guarantees relief on the claim asserted herein.

Due Process does not require that judicial review be available for a claim of newly presented evidence. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court observed that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* at 400. Concurring, Justice Scalia further expressed the view in *Herrera* that "[t]here is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Id.* at 427-428.

Claims of newly presented evidence do not, alone, entitle a prisoner to relief unless the prisoner can link that evidence to a constitutional violation. *Townsend v. Sain*, 372 U.S. 293 (1963). That newly presented evidence "must bear upon the constitutionality of the applicant's detention" explains why 42 U.S.C. § 1983 is an inappropriate vehicle for the introduction of such evidence, since § 1983 may not be used to challenge the fact or duration of the prisoner's conviction. *Wilkinson v. Dotson*, 544 U.S. 74 (2005). In *Townsend*, Chief Justice Earl Warren noted that

> "Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus. Also, the district judge is under no obligation to grant a

> hearing upon a frivolous or incredible allegation of newly discovered evidence."

Id. at 317.

The Ninth Circuit notes that the DNA testing methods now requested by Mr. Osborne were not accessible to him pre-trial, and notes further that the methods of testing sought "are far more discriminating than the testing methods that were available pre-trial." 521 F.3d, at 1129. Nonetheless, unavailability of the post-conviction constitutional right does not turn on the nature or form of the newly presented evidence. *See Herrera, supra*, 506 U.S., at 400. For purposes of constitutional analysis, there is no difference between newly presented evidence resulting from scientific testing of biological evidence, and the newly presented evidence contained in the affidavits sought to be introduced post-conviction by the petitioner in *Herrera*, or, indeed, the new discovery of any other type of evidence after conviction.

The creation of an unrestricted constitutional right to post-conviction DNA testing impacts on the finality of a state criminal conviction because a new constitutional violation could potentially be asserted with each new technological advance in evidence gathering techniques. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court observed that finality "is essential to the operation of our criminal justice system," and that "without finality, the criminal law is deprived of much of its deterrent effect." 489 U.S., at 309 (plurality opinion). As the Fourth Circuit noted in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002)("*Harvey I*"),

> [t]he Supreme Court has made clear that the finality of convictions cannot be brought into question by every change in the law . . . Similarly, we believe that finality cannot be sacrificed to every change in technology. The

> possibility of post-conviction developments, whether in law or science, is simply too great to justify judicially sanctioned constitutional attacks upon final criminal judgments . . . Establishing a constitutional due process right under § 1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state. This we cannot do . . . While finality is not the sole value in the criminal justice system, neither is it subject to the kind of blunt abrogation that would occur with the recognition of a due process entitlement to post-conviction access to DNA evidence.

Id. at 376 (citations omitted).

Creation of an unrestricted constitutional right to post-conviction DNA testing has potential for abuse, since a criminal defendant could elect to forgo the introduction at trial of DNA evidence testing which could have inculpatory, exculpatory or neutral results and, upon conviction, seek such testing on constitutional grounds.

B. The Court Should Not Create A New Constitutional Right To Post-Conviction DNA Testing Where None Presently Exists.

1. Post-Conviction Review Would Require An Unwarranted Expansion Of Both Substantive And Procedural Protections.

Although the Court has not determined the existence of a Fourteenth Amendment residual liberty interest in demanding judicial consideration of newly presented evidence of innocence brought forward after

conviction, this has not left convicted prisoners without remedy. Such prisoners have obtained post-conviction DNA testing under appropriate circumstances and have actually established their innocence in several cases. Given the demonstrated availability of post-conviction relief, there is no need to create a constitutional right to such evidence where none presently exists.

Absent demonstration of a constitutional violation, the Constitution makes no provision for the post-conviction introduction of newly discovered or newly asserted evidence. The Ninth Circuit acknowledges that it "expressly applied" *Brady v. Maryland*, 373 U.S. 83 (1963), " as a post-trial right and specifically disclaimed reliance on a pre-trial Brady violation or any other pre-trial violation." 521 F.3d, at 1128-1129. *Brady*, however, ensures that a defendant receives a fair trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985). The Ninth Circuit's reliance upon *Brady* fails because the right to a fair trial ends when the trial is completed.

Brady, of course, concerns the suppression, prior to and during trial, of evidence material to the proceedings, the suppression of which denied the defendant a fair trial. In *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25, this Court recognized that due process obligates a prosecutor to disclose exculpatory evidence at trial, and explained that, after trial, a prosecutor maintains a non-constitutional ethical obligation to inform the appropriate authority of after-acquired evidence or other information that might cast doubt upon the correctness of the conviction. Thus *Imbler* does not suggest that the prosecution maintains an ongoing due process obligation pursuant to *Brady* after the trial has ended.

Mr. Osborne, for his part, essentially seeks to extend *Brady* to discovery which is unconnected to a pending substantive claim, and the Ninth Circuit has, in

response, created a right to discovery that exists independently of any substantive claim. Here, Mr. Osborne asserts an intent to advance a freestanding claim of innocence, but Mr. Osborne presently has no ongoing substantive claim that would permit the discovery he seeks. Section 1983 was never intended to be used as a device to obtain discovery of evidence that is material to a claim that has yet to be asserted.

Indeed, if Mr. Osborne were to obtain the testing he seeks and the results of that testing inculpated him or were inconclusive, it is unlikely that he would proceed with a freestanding innocence claim. Consequently, the Ninth Circuit's conclusion that "[u]ntil Osborne has actually brought an actual innocence claim . . . Osborne's access-to-evidence claim may proceed on the well-established assumption that his intended freestanding innocence claim will be cognizable in federal court," 521 F.3d, at 1131, severs the right of access to evidence from a pending action or procedure, and the Ninth Circuit does not identify a valid basis for permitting Mr. Osborne to conduct discovery that is unconnected to a pending substantive claim.

Moreover, application of *Brady v. Maryland* to the instant case would result in a rule that effectively would require federal courts to re-try a convicted person's guilt or innocence of a state offense, which is the ultimate issue in the state criminal trial. Such an expansionist rule cannot be justified because there is no constitutional authority for extending an inquiry into guilt or innocence beyond the deliberations of the fact-finder at trial.

An accused person is convicted only upon evidence that is sufficient to fairly support a conclusion that every element of the crime has been established beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). A vast array of due process protections exists that help to assure that no innocent person is convicted of a

crime.[2] The integrity of the legal process in a criminal case is protected by rules governing the admissibility of evidence, the requirement that a defendant receive the effective assistance of counsel, the placement of the burden of proof on the prosecution, the condition that guilt be established beyond a reasonable doubt, and other measures. Where a prosecutor withholds exculpatory evidence, post-trial relief is available pursuant to the *Brady v. Maryland* doctrine.

Regarding judicial creation of a constitutional right to post-conviction DNA testing, the Fourth Circuit has noted in *Harvey I* that

> "our decision reflects the core democratic ideal that if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right. Permitting [petitioner's § 1983] claim to proceed would improperly

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[2] While it is well settled that the Due Process Clause does not permit the government to punish an individual unless and until it has proven his or her guilt beyond a reasonable doubt at a criminal trial in accordance with relevant constitutional guarantees, *Bell v. Wolfish*, 441 U.S. 520, 535-536 & n.16 (1979), by proving plaintiff's guilt at trial the state has satisfied that requirement. Accordingly, plaintiff may no longer properly be viewed as an innocent person. In *Herrera v. Collins*, 506 U.S., at 399-400, this Court noted that "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears (citation omitted) . . . [t]hus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law . . . ."

short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right.

This is not an area in which legislatures have been inactive. For example, the Innocence Protection Act of 2001 has been introduced in both houses of Congress. *See* S. 486, 107th Cong. (2001), 147 Cong. Rec. S1999 (Mar. 7, 2001); H.R. 912, 107th Cong. (2001). The Act would increase the availability of post-conviction DNA testing for a person convicted of a federal crime. The Act would also condition the grant of federal funds for state DNA-related programs on an assurance that the state will make post-conviction DNA testing available in specified types of cases. And the Act would require states to increase the availability of post-conviction DNA testing for death row inmates. *See* S. 486 §§ 101-104, 147 Cong. Rec. at S2001-03; H.R. 912 §§ 101-104.

Allowing [petitioner's] action to proceed . . . would judicially preempt legislative initiatives in this area . . . [petitioner] urges us to balance, under *Mathews*, an inmate's need for post-conviction DNA testing against the administrative burden to the state of providing it. However, this very balance is the one that legislative bodies are currently trying to strike. Establishing a federally supervised right of access via *Mathews* would cut off this on-going process and place the federal courts in a distinctly legislative posture."

Harvey v. Horan, supra, 278 F.3d at 376. Many states have already reached such a balance.[3]

In addition, the accuracy of conviction and sentence are further promised by state and federal habeas review. State collateral review encompasses claims of fundamental or constitutional error, and federal habeas review encompasses claims of federal constitutional error. Although the existence of newly presented evidence relevant to guilt does not establish a basis for federal habeas review where the evidence is not related to a constitutional violation, *Townsend v. Sain*, 372 U.S., at 317, actual innocence is considered in an evaluation of whether a procedural default or abuse of the writ forecloses review of a constitutional claim.

2. The Scope Of Federal Review Should Not Be Extended To Post-Conviction Claims Of Actual Innocence Based On Newly Asserted Evidence.

"[I]t is an assumption of our system of criminal justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' that no person may be punished criminally save upon proof of some specific illegal conduct (citations omitted)." *Schad v. Arizona*, 501

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[3] For example, the New York State Legislature did so in Article 440 of the Criminal Procedure Law: Section 440.30 specifically provides a post-trial mechanism by which a convicted person may obtain DNA evidence if a minimal threshold showing is made, and Section 440.10 specifically provides an avenue by which a criminal defendant can challenge his conviction with such evidence - both, unlike section 1983 or federal habeas review, without any time bar to such relief.

U.S. 624, 633 (1991). The Supreme Court has also recognized that the "states possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). States should be allowed to make the final determination of guilt or innocence.

Consequently, the determination by a federal court of a state prisoner's actual guilt of a state offense based upon a post-conviction proffer of newly-discovered evidence, independent of any causative constitutional error, is overly intrusive. Direct review is the primary avenue for the review of a conviction or sentence, and when the process of direct review reaches a conclusion, a presumption of finality and legality attaches to that conviction and sentence. Despite the importance of federal habeas proceedings to ensure that constitutional rights are observed, the role of federal habeas is secondary and limited, and the federal courts are not forums in which to relitigate state trials. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

C. This Case Does Not Present A Violation Of A Procedural Due Process Interest.

Procedural due process requires a balancing of the individual interest, state interest, and probability that further procedural safeguards will reduce any risk of error. *Mathews v. Eldridge*, 424 U.S. 329, 334-35 (1976). The Court has made clear that "[p]rocess is not an end in itself," and does not create a liberty interest where there is no underlying substantive "interest for process to protect." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). Any presumed procedural right should not be afforded greater protection than the substantive right to which plaintiff cannot demonstrate entitlement.

The Due Process Clause applies where governmental action deprives a person of liberty or property. Accordingly, when an individual claims a denial of due process, courts inquire into the nature of the individual's claimed interest. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). It has been observed that the "Supreme Court has not established, clearly or otherwise, a constitutional right to postconviction DNA testing." *Shenouda v. Breslin*, 2004 U.S. Dist. Lexis 17018 (E.D.N.Y. 2004).

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

The Court has not held that, for procedural due process purposes, an inmate has a liberty interest in overcoming the fact of conviction pursuant to a valid conviction. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S., at 7. The Court has also observed that "an inmate has 'no constitutional or inherent right' to commutation of his sentence" and has noted that, unlike probation decisions, "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S., at 464.

Accordingly, the Court should find that there has been no due process violation here.

II. A Post-Conviction Request For Access To Biological Evidence Cannot Be Brought As A Claim Under 42 U.S.C. § 1983 In The Absence Of A Showing That The Conviction Was Invalid.

State prisoners have two potential avenues to remedy violations of their federal constitutional rights: a habeas petition under 28 U.S.C. § 2254, and a civil suit under 42 U.S.C. § 1983. *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). Under the federal habeas corpus statute, a prisoner seeking release from state custody on account of a wrongful conviction must first exhaust state judicial remedies before filing a habeas petition in federal court.[4]

A § 1983 suit, unlike a habeas petition, is generally not barred by a failure to exhaust state remedies. Id. at 480-81. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release from that imprisonment, his sole federal remedy is a writ of habeas corpus." 441 U.S., at 500. In *Heck*, the Court enunciated what is referred to as the "favorable termination" requirement: where, if successful, a prisoner's § 1983 action "would necessarily imply the invalidity" of his or her conviction or sentence, it must be dismissed "unless the prisoner can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S., at 487.

In *Preiser*, the Court discussed the potential overlap between § 1983 actions[5] and habeas corpus petitions[6] for

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[4] 28 U.S.C. 2254(b).

[5] Section 1983, which contains no requirement that state judicial remedies be exhausted, provides:

the first time. Both § 1983 and habeas corpus share the common requirement that the suit must allege the violation of a constitutional right.[7]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1983.

[6] In pertinent part, Title 28 U.S.C. 2254 provides that "[A]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. 2254(b).

[7] One commentator has noted that "[a] post-conviction right of access to evidence is difficult to categorize as a constitutional right because it fails to neatly fit into any preexisting categories of recognized procedural or substantive due process rights." Vetter, *Habeas, Section 1983, and Post-conviction Access to DNA Evidence*, 71 U. Chi. L. Rev. 587, 590 (2004).

See also Harvey v. Horan, 285 F.3d 298, 310-311 (4th Cir. 2002) (Luttig concurring) ("[A post-conviction right of

In *Preiser*, the Court recognized practical reasons why a prisoner might prefer to bring a § 1983 action, and noted a "literal applicability" of the language of that statute. 411 U.S., at 486. Of course, § 1983 enables a prisoner to immediately go to federal court and, effectively, potentially bypass the state court system.

Nonetheless, the Court held that for those cases at the heart of habeas corpus, when a state prisoner challenges the fact or duration of his or her physical imprisonment, and by way of relief seeks a determination that he or she is entitled to immediate or a speedier release, the exclusive federal remedy is habeas. The Court, contemplating the strong policy considerations of federal-state comity which require giving a state court system that has convicted a defendant the first opportunity to correct its own errors, reasoned that:

> In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that

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access to evidence] is not one to material, exculpatory evidence necessary to ensure a fair trial . . . It is not a right of 'factual innocence' . . . Nor is it one of right to the preservation of potentially exculpatory evidence.").

> specific determination must override the general terms of § 1983.
>
> The policy reasons underlying the habeas corpus statute support this conclusion. The respondents concede that the reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation - - to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors (citation omitted).

Id. at 489-490. Thus, defining the scope of the "implicit exception from § 1983's otherwise broad scope for actions that lie 'within the core of habeas corpus'"[8] the Court concluded that a § 1983 action will not lie when a state prisoner challenges the fact or duration of his or her confinement and seeks either immediate release from prison or the shortening of his or her term of confinement. 411 U.S., at 482.

As recently as 2005, the Court reiterated that "a prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.' He must seek federal habeas corpus relief (or appropriate state relief) instead (citations omitted)." *Wilkinson v. Dotson*, 544 U.S. 74 (2005). Reviewing *Preiser* and *Heck*, the Court explained that:

> "Throughout the legal journey from *Preiser* to *Balisok* the Court has focused on the need to

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[8] 411 U.S., at 487.

> ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement - - either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody . . . These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation) - - no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) - - *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration (emphasis in original)."

544 U.S., at 81-82.

Thus, *Dotson* clarifies that *Heck* provides the relevant test to a determination of the applicability of § 1983 under circumstances involving post-conviction access to DNA evidence. Nonetheless, the courts of appeal are divided on this issue. The Seventh, Ninth and Eleventh Circuits have allowed access-to-evidence claims to be brought under § 1983, while the Second, Fourth, Fifth and Sixth Circuits have rejected those claims.

In *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), *reh'g en banc denied*, 285 F.3d 298 (4th Cir. 2002)[9], the Court of Appeals for the Fourth Circuit applied this Court's rationale in a matter where a criminal defendant sought injunctive relief that "necessarily implies the invalidity of

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[9] The defendant's application for a rehearing was ultimately mooted because the state adopted a statutory right to DNA testing.

his conviction." 278 F.3d, at 375. The Fourth Circuit reasoned that this Court's holding that civil tort actions are inappropriate for challenging the validity of outstanding criminal judgments was based upon the view that allowing such a usage "would undercut the long-standing concern not to undermine the finality of criminal convictions through civil suits." 278 F.3d, at 375.

In *Harvey*, where the convicted defendant proclaimed his innocence and argued that DNA testing would lead to his exoneration, the Fourth Circuit correctly held that an action under § 1983 could not lie. The Fourth Circuit found that the convicted defendant sought to use § 1983 to invalidate a final state conviction without having challenged the lawfulness of that conviction, and held that the defendant failed to state a claim under the statute. In reaching its determination, the Fourth Circuit properly noted that § 1983 exists for the limited purpose of redressing violations of the Constitution and federal statutes, and not for the purpose of attacking the finality of criminal judgments. The Fourth Circuit also noted that "[t]he whole point of *Heck* was to protect the finality of state judgments of conviction from challenge via unexhausted § 1983 actions." 278 F.3d 375, at fn. 1.[10]

Recognizing that "[t]he Supreme Court has made clear that the finality of convictions cannot be brought into question by every change in the law," the Fourth Circuit reasoned that "finality cannot be sacrificed to every change in technology." 278 F.3d at 376. The Fourth Circuit also noted the distinction between the introduction of newly

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[10] *See also Harvey v. Horan*, 285 F.3d 298, 303 (4th Cir. 2002) ("the whole point of *Heck* was to keep a state prisoner from challenging his conviction in federal court in the first instance through an unexhausted habeas claim masquerading as a § 1983 claim").

discovered evidence, which in some cases may warrant a new trial, and the new testing of existing biological evidence, which the convicted defendant in that matter sought.

In addition, the Fourth Circuit considered the substantive issue underlying the claim; that is, what rights to the testing of DNA evidence does a prisoner have, after having unsuccessfully appealed his conviction and failing in his habeas petitions. Reversing the District Court, which asserted that the prisoner had an affirmative due process right of access to DNA evidence under *Brady v. Maryland*[11], the Fourth Circuit stated, in dicta, that capital prisoners have no constitutional right to post-conviction access to DNA evidence, and that "if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right." 278 F.3d, at 376. The Fourth Circuit also took the position that "[e]stablishing a constitutional due process right under § 1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state. This we cannot do." 278 F.3d, at 376.

Finally, the Fourth Circuit reasoned that when a prisoner requests access to DNA evidence "for one reason and one reason only – as the first step in undermining his conviction," his § 1983 action constitutes, in effect, a

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[11] 373 U.S. 83 (1963) (entitling criminal defendants to disclosure from the prosecution of all favorable and material evidence in the state's possession, upon request, as a matter of due process). In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Id.* at 87.

successive habeas petition and thus is an impermissible attempt to circumvent *Heck*. 278 F.3d, at 375.[12]

The Court of Appeals for the Fifth Circuit reached a similar conclusion in *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), affirming the District Court's *sua sponte* dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of the complaint and "treating [the] complaint as, in effect, another successive habeas corpus petition." 303 F.3d, at 340. In that action, the petition asserted claims against county officials who refused to release biological evidence introduced at trial for DNA testing, where that evidence was sought on the ground that it might be exculpatory.

In agreeing with the Fourth Circuit's analysis in *Harvey*, *supra*, the Fifth Circuit properly relied upon this Court's holding in *Heck* that under § 1983, no cause of action exists that would necessarily imply the invalidity of a plaintiff's conviction or sentence unless it is proven that the conviction or sentence has already been invalidated. Finding *Harvey* to be "strongly persuasive," the Fifth Circuit noted that it had also previously held that:

> claims seeking to attack the fact or duration of confinement, as well as claims which are "so

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[12] In his concurrence to the denial of rehearing en banc, Judge Luttig disagreed, writing that post-conviction DNA testing does not even arguably "necessarily impl[y]" the invalidity of the underlying conviction, and stating that "The results of any DNA tests that are eventually performed may be inconclusive, they may be insufficiently exculpatory, or they may even be inculpatory. That these scientific possibilities exist, in and of itself, suffices to establish that the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence." 285 F.3d 298, 307 (4th Cir. 2002).

> intertwined" with attacks on confinement that their success would "necessarily imply" revocation or modification of confinement, must be brought as habeas corpus petitions and not under § 1983. *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir. 2002). Under *Martinez*, a prisoner's request for DNA testing of evidence relevant to his prior conviction is "so intertwined" with the merits of the conviction as to require habeas corpus treatment.

303 F.3d, at 341.

In contrast, the Second Circuit in *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007), recently joined the Seventh, Ninth, and Eleventh Circuits, agreeing with them that a claim seeking post-conviction access to evidence for DNA testing may properly be brought as a § 1983 suit 481 F.3d at 99. The Second Circuit openly split with the Fourth Circuit and held that a § 1983 action may be maintained where a prisoner seeks post-conviction DNA evidence because success in that suit would not demonstrate the invalidity of his conviction or sentence. The Second Circuit concluded that "the governing standard for application of the Preiser-Heck exception, then, is whether a prisoner's victory in a § 1983 suit would *necessarily demonstrate* the invalidity of his conviction or sentence; that a prisoner's success might be merely helpful or *potentially* demonstrative of illegal confinement is, under this standard, irrelevant (emphasis in original). 481 F.3d at 102.

In the matter presently before the Court, *Osborne v. Dist. Atty's Office for the Third Judicial Dist.*, 423 F.3d 1050 (9th Cir. 2005), the Court of Appeals for the Ninth Circuit acknowledged that *Dotson* "clarifies that Heck provides the relevant test to determine whether § 1983 is a

permissible avenue of relief for Osborne." 423 F.3d, at 1053. Nevertheless, the Ninth Circuit, in departing from the reasoning of the Fourth Circuit in *Harvey*, held that success in a § 1983 action would not necessarily demonstrate the invalidity of confinement or its duration. 423 F.3d, at 1054. Citing to *Dotson*, the Ninth Circuit reasoned that it is only access to evidence that would result from a prisoner's successful § 1983 action in this situation, and nothing more. The Ninth Circuit further reasoned that there is a significant chance that further DNA analysis would either confirm or have no effect on the validity of the prisoner's confinement and would not necessarily prove exculpatory. In addition, the Ninth Circuit noted that, even if the DNA evidence exonerated a prisoner, he or she would need to bring a separate action, alleging a separate constitutional violation, to overturn the conviction.

The Ninth Circuit concedes that "the *Dotson* court found it key that neither prisoner sought an injunction ordering 'immediate or speedier release'" 423 F.3d, at 1055, but apparently overlooks this Court's determination that a state prisoner's § 1983 action is barred "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." 544 U.S. 74, 82 (2005). It is respectfully submitted that the Ninth Circuit's narrow reading of *Dotson* would result in an unintended and impermissible expansion of § 1983.

To the extent that the *McKithen* and *Osborne* decisions, which sever the § 1983 petition from its ultimate objective, may be read as being faithful to the letter of *Preiser* and *Heck*, it is respectfully submitted that those decisions are not faithful to the spirit of the decisions of the Supreme Court. The *Preiser* and *Heck* decisions clearly were intended to direct claims attacking the validity of a prisoner's conviction or sentence toward the rigorous

procedure of habeas corpus and away from § 1983 actions.[13]

It is critical to this discussion to note that in virtually all the cases discussed in which an appellant has sought post-conviction DNA testing of blood or semen or articles of clothing, the prosecution had introduced some evidence of this type against defendant when he/she was a defendant in the criminal trial which resulted in conviction. Moreover, there is often an identity issue involved in the prosecution. In their post-conviction applications, these appellants are seeking to have more scientifically advanced methods of testing utilized in order to demonstrate that they were not in fact the perpetrator of the crime for which they were convicted. *See, e.g. Bradley v. Pryor*, 305 F.3d 1287 (9th Cir. 2002) (state used rape kit at trial to connect him to the crime and identify him as rapist and murderer, and the appellant seeks to have the biological evidence tested now with more advanced scientific methods); *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002) (the appellant seeks biological evidence introduced against him at his trial for retesting by more advanced methods to prove innocence). In these cases there is a presumed materiality of the testing of the biological evidence to the appellants' convictions since the prosecution used the evidence at least in part to make its case for conviction. In other words, there is a presumed relevance to guilt or innocence of the request for more sophisticated testing.

In the action before this Court, it may not be denied that, at bottom, Mr. Osborne seeks DNA testing for the sole

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[13] *See* Kreimer & Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 614 (2002) (the Supreme Court was concerned that § 1983 not be used to circumvent the exhaustion requirement of federal habeas corpus petitions).

purpose of attempting to demonstrate his innocence of the crime for which he was convicted. 521 F.3d, at 1126. This lies at the "core of habeas corpus." *Preiser*, 411 U.S., at 489.

To the extent that Mr. Osborne seeks to demonstrate his innocence, it is undeniable that he necessarily seeks to attack the fact of his conviction. Accordingly, this Court should look to the substance of the remedy sought. For a prisoner who obtains exculpatory post-conviction DNA evidence, success would necessarily demonstrate the invalidity of his or her confinement and ultimately lead to immediate or speedier release from confinement, falling squarely within the ambit of *Heck*. The possibility that such DNA evidence may prove to be inconclusive or even inculpatory, and that an immediate or early release is not assured, does not negate the fact that the relief sought pursuant to § 1983 goes to the heart of the issue of the invalidity of confinement.

It is respectfully submitted that permitting Mr. Osborne the relief he seeks pursuant to § 1983, without a previous determination that the conviction is constitutionally invalid, would necessarily imply the invalidity of his conviction irrespectively of the outcome of such a DNA test. Mr. Osborne's § 1983 claim, seeking post-conviction DNA testing of evidence relevant to that conviction, is inextricably intertwined with the merits of his conviction, such that success would necessarily imply a revocation or modification of his confinement.

Mr. Osborne impermissibly seeks to use 42 U.S.C. §1983 as an initial step to overturn his conviction, and thereby obtain his immediate or speedier release from prison. Accordingly, the *Heck* rule is plainly applicable.

In sum, for all of the reasons above, the Court should reverse the judgment of the court below.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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